86-795

No. .....

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

—o—

WESTMAC, INC.,

Petitioner,

vs.

LON SMITH, SMITH BROTHERS VELTE & COMPANY, SMITH BROTHERS VELTE & COMPANY d/b/a SUNFIELD FARMERS ELEVATOR CO., BERT POST, MINOR WALTON BEAN COMPANY, FRANK E. BOWLES, POTTERVILLE ELEVATOR COMPANY, MID-MICHIGAN FARM AND GRAIN ASSOCIATION, INC., and ALL MEMBERS, STOCKHOLDERS and OFFICERS OF MID-MICHIGAN FARM AND GRAIN ASSOCIATION, INC.,

Respondents.

—/

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

GREGORY G. PRASHER (P19068)
GARY P. SCHENK (P19970)
DAN E. BYLENGA, JR. (P32154)

SCHENK, BONCHER & PRASHER
301 College Park Plaza
180 N. Division
Grand Rapids, MI 49503
(616) 454-8277

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

98 pp

QUESTION PRESENTED FOR REVIEW

WHERE FACTS IN THE RECORD INDICATE RESPONDENTS' PRIMARY OBJECTIVE FOR FILING A STATE COURT ACTION WAS TO OBTAIN AN ILLEGAL ANTI-COMPETITIVE RESULT ENTIRELY COLLATERAL TO THE OSTENSIBLE PURPOSE OF THE LITIGATION, WILL GRANTING RESPONDENTS *NOERR-PENNINGTON* IMMUNITY BASED ON THE MERE ALLEGATION OF A "COLORABLE CLAIM" OR AN "ISSUE OF SUBSTANCE" IN THE STATE COURT ACTION UNDERMINE THE TEST OF *NOERR-PENNINGTON*'S "SHAM" EXCEPTION AS RECOGNIZED BY THE U.S. SUPREME COURT AND THE OTHER U.S. CIRCUIT COURTS OF APPEALS AND INVITE ABUSIVE USE OF THE STATE AND FEDERAL COURTS TO ACHIEVE ANTI-COMPETITIVE ENDS?

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OPINIONS AND ORDERS BELOW

The initial panel opinion by the United States Court of Appeals for the Sixth Circuit that issued on July 30, 1986, is reported as *Westmac, Inc. v Smith,* 747 F 2d 313 (6th Cir 1986) and is reproduced in this Petition's Appendix 1a through 21a.

The several Opinions and Orders entered in the United States District Court for the Western District of Michigan, Southern Division, are unpublished and reprinted in this Petition's Appendix at 49a through 75a.

The Court of Appeals Order entered September 18, 1986, denying Petitioner's petition for rehearing en banc also is unpublished and is reprinted in this Petition's Appendix at 22a.

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STATEMENT OF JURISDICTION

The original proceeding before the United States District Court for the Western District of Michigan was initiated pursuant to 29 USC § 1337. The case was dismissed by the United States District Court on May 21, 1985 upon Respondent's Fed. R. Civ. P. 56 motion for summary judgment. Notice of appeal to the Sixth Circuit Court of Appeals was filed on June 10, 1985.

The date of the opinion and decision filed in the Sixth Circuit Court of Appeals was July 30, 1986. Petitioner applied for rehearing en banc. The petition for rehearing was denied by the Sixth Circuit on September 18, 1986.

Jurisdiction in the Supreme Court of the United States is based on 28 USC § 1254 and the 60 day period in which to file a Petition for Writ of Certiorari provided by Rule 20.4 of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution of the United States of America

AMENDMENT I

Religious freedom; freedom of speech and press; right to peaceably assemble and petition.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 15 USC § 1 Trust, etc., in restraint of trade illegal; exception of resale price agreement; penalty.

> Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any

contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647 § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

3. 15 USC § 15 Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

STATEMENT OF THE CASE

The U.S. District Court Complaint filed by Petitioner, Westmac, Inc., charged the various Respondents with pursuing and conducting sham state court litigation for the express and collateral purpose of forcing Westmac, Inc. to join an anti-competitive price maintenance conspiracy or,

if that failed, to so damage Westmac, Inc. economically as to destroy its ability to compete with Respondents in the marketplace. Jurisdiction in the U.S. District Court for the Western District of Michigan was premised on 28 USC § 1337.

The case focused on Respondents' concerted opposition to Westmac, Inc.'s efforts to obtain special tax benefit bond financing (EDC bond financing) for construction of a grain elevator facility in Clinton County, Michigan, and whether Respondents' state court lawsuit challenging the constitutionality of the EDC financing statute constituted an abuse of process and an illegal anti-competitive activity in violation of the Federal Anti-Trust Acts.

In February, 1981, Westmac, Inc. filed an application with the Clinton County Economic Development Corporation to obtain EDC financing for its grain terminal facility in Clinton County, Michigan. Initial approval of the project was obtained on February 26, 1981 and, shortly thereafter, one of the Respondents, Mr. Lon Smith, contacted the President of Westmac, Inc., Mr. John Williams, to confirm that Westmac, Inc. intended to build a grain terminal facility in the area. After Mr. Williams confirmed that fact another Respondent, Bert Post, called him to arrange a luncheon meeting in Grand Rapids, Michigan. The companies owned and operated by both Mr. Smith and Mr. Post would be competitors once Westmac's grain terminal facility was completed in Clinton County. At the luncheon Respondent Bert Post directly asked Westmac, Inc.'s President to discuss certain "standard" charges which "should be implemented" at the new grain terminal facility in order to maintain a "uniformity in certain charges" levied against grain sellers in the area marketplace. Mr. Post stated the other

area elevators had agreed on certain "charges" which included in-and-out charges, grain drying charges and charges to be paid for grain and Respondent Post sought Westmac's agreement to said "charges". John Williams immediately terminated the discussion and told Mr. Post to go back and tell his fellow elevator operators that Westmac, Inc. would not agree to any "standard" or "uniform" charges and reported the discussion to the United States District Attorney for the Western District of Michigan.

Within days of Westmac's refusal to adopt the so-called "uniform charges", Respondents began actively opposing Westmac, Inc.'s grain terminal facility. The concerted opposition by Respondents to the Westmac, Inc. project culminated in their filing of a state court lawsuit on August 5, 1981 ostensibly to challenge the constitutionality of the EDC Bond Act.

Respondents' "real purpose" behind the filing of the lawsuit in state court was, however, like the "real intent" referenced by Mr. Justice Stewart in his concurring opinion in *California Motor Transport Co v Trucking Unlimited,* 404 US 508, 518, 92 S Ct 609, 615, 30 L Ed 2d 642, 650 (1972), to coerce Westmac, Inc. into joining their anti-competitive, price fixing conspiracy or, if that failed, to economically eliminate Westmac, Inc. as a competitor by preventing or delaying the sale of the EDC bonds.

Among the facts in the record supporting Westmac's claim that the state court action was initiated for this illegal collateral purpose are documents produced by Respondents in discovery and a statement made by Respondent Frank Bowles to Westmac, Inc. during Respondents' unsuccessful appeal of their unsuccessful state court action. The key

document was a note handwritten by one Respondent of a meeting held in Grand Ledge on May 14, 1981, outlining a plan for opposing Westmac's EDC financing. The note concluded as follows:

> "If this [lobbying activity] doesn't succeed, start a lawsuit—bonds won't sell".

Following this meeting, a memo was sent on June 24, 1981 from Respondent Lon Smith to an attorney in Grand Ledge, Michigan summarizing the purpose of Respondent Mid-Michigan Farm and Grain Association, Inc., to wit:

> "*Actual purpose is to block EDC and tax abatement for the elevator* being built in Eagle Twp. one mile north of Grand Ledge. . . The attorney who wrote this up claims there is no potential for liability (personally or corporately)." (Emphasis added)

The material produced by Respondents also contained typewritten notes entitled "miscellaneous questions and thoughts". According to those miscellaneous questions and thoughts, drafted by Respondent Lon Smith, he noted as follows:

> "A letter I wrote to area elevator in August, 1981 pleading for more contributions has two inflamatory references to [(*if nothing else, we'll delay sale of the bonds*)]". (Emphasis added).

Finally, during the course of Respondents' unsuccessful appeal of the state court action one of the Respondents, Frank Bowles, indicated to Westmac, Inc. that if Westmac, Inc. implemented the uniform "prices" in the Central Michigan Grain market that Respondents' opposition to the EDC financing would cease and the appeal of the state court lawsuit would be dismissed. Despite the economic

damage being done to Westmac because the EDC bonds weren't selling, Westmac, Inc., refused this offer.

As a direct consequence of the *filing and pursuit of* Respondents' state court litigation (not its ultimate resolution in Westmac's favor), Westmac, Inc.'s EDC bonds did not sell for a long time and Westmac, Inc. incurred substantial increased interest costs because Westmac had to carry its construction loan at interest rates significantly greater than the committed bond rates. The additional interest costs and fees cost Westmac, Inc. over Two Hundred Fifty Thousand Dollars ($250,000), ultimately rendered Westmac unable to meet its bond obligations and resulted in Westmac's ilimination as a competitor in the Clinton County area.

The United States District Court for the Western District of Michigan, when faced with Respondents' Rule 56 motion for summary judgment, granted the motion based on the *Noerr-Pennington* Doctrine. On March 26, 1985 the District Court denied Westmac, Inc.'s Motion for Re-Hearing and or relief from the Partial Summary Judgment Order despite a finding that the evidence presented "supports plaintiff's contention that the state court action was initiated with the primary intent of doing harm to plaintiff's business". The entire case was dismissed on May 21, 1985.

On appeal, the Sixth Circuit Court of Appeals affirmed the District Court's ruling and held that where the state court pleadings set forth a "colorable claim" or an "issue of substance" the lawsuit was accorded a constitutional "presumption" of legitimacy. Given that, the Sixth Circuit ruled that no genuine issue of material fact existed respecting whether Defendants' lobbying and litigation ac-

tivities were protected by the *Noerr-Pennington* Doctrine. Circuit Judge Merritt dissented and disagreed that the mere existence of an "issue of substance" or a "colorable claim" in the state court lawsuit created a constitutional presumption of no judicial abuse of process and hence no "sham" litigation under the *Noerr-Pennington* Doctrine. Judge Merritt went further and stated that, in his opinion, the District Court decided the case under an erroneous definition of the sham exception. Petitioner, Westmac, Inc., sought rehearing en banc and, on September 18, 1986, the Sixth Circuit denied the Petition for Rehearing.

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REASONS FOR ALLOWING THE WRIT

The Petition for Writ of Certiorari should be granted because *Westmac, Inc. v Lon Smith, et al,* 797 F2d 313 (6th Cir 1986) conflicts with and undermines the test of the "sham" exception to the *Noerr-Pennington* Doctrine followed by the Supreme Court in *California Motor Transport,* supra, and adopted by the Second Circuit[1], Ninth Circuit[2], Fourth Circuit[3], Eighth Circuit[4] and the Seventh

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[1] *Litton Systems Inc v American Tel & Tel Co,* 700 F2d 785, 809-810 (2nd Cir 1983), cert denied, 104 S Ct 984 (1985) (Invocation of the litigation process for the injury the process alone will work upon competitors triggers the "sham" exception; no presumption test adopted.)

[2] *Rickardo v Canine Eye Registration Foundation,* 783 F2d 1329 (9th Cir 1986), US App Pndg (Immunity is not afforded to those who resort to sham or unfounded litigation solely for anti-competitive purposes; no presumption test adopted.)

(Continued on following page)

Circuit[5]. A jury assessment of Respondents' "real intent" behind their initiation and pursuit of the state court action was precluded by the Sixth Circuit's "presumption based on the pleadings" test. As a result, the basic reason for the existence of the "sham" exception was frustrated and the First Amendment's *Noerr-Pennington* shield was turned into a mere question of pleadings, not a test of true intent and genuine motivation.

Simply put, the Sixth Circuit's presumption test fosters and encourages misuse and abuse of the litigation process by anti-trust predators and others who seek to obtain illegal and collateral results. Price-fixers are given a green light to make full use of the Federal and State Court systems to coerce and force their competitors to join price maintenance conspiracies so long as they are shrewd enough to plead an "issue of substance" or a "colorable claim". The Sixth Circuit's *Westmac* decision approves and condones Respondents' litigation tactics in the face of Respondents' verbal and written statements that those tactics were designed to achieve an illegal, collateral result

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(Continued from previous page)

[3] *Hospital Building Co v Trustees of Rex Hospital,* 791 F2d 288 (4th Cir 1986) (The sham exception applies where the defendant's activity was intended to injure the plaintiff directly rather than through a government decision; no presumption test adopted.)

[4] *Central Telecommunications Inc v TCI Cablevision Inc,* 800 F2d 711 (8th Cir 1986) (The essential element of the sham exception is an absence of a genuine effort to influence government and an intent to injure a competitor directly; no presumption test adopted.)

[5] *SJ Advanced Technology & Mtg Corp v Junkunc,* 627 F Supp 572 (ND Ill 1986) (Predatory misuse of litigation to injure a competitor falls outside the *Noerr-Pennington* shield against anti-trust liability; no presumption test used.)

and, in the face of a factual determination by the U.S. District Court that Respondents' written statements supported "plaintiff's theory that defendants acted with an anti-competitive animus". Not only does this *Westmac* decision conflict with decisions of other Circuits within the meaning and intent of Sup. Ct. R. 17.1(a) and (c), but, in today's litigation-prone society where Courts and the legal profession are being justifiably scrutinized and criticized, the Sixth Circuit's decision cannot be sustained either as a matter of sound public policy or constitutional interpretation.

A.

Use of State Court litigation to achieve an illegal collateral and anti-competitive result cannot and should not be sheltered from anti-trust sanctions by the First Amendment and its Noerr-Pennington Doctrine.

As stated by Judge Merritt in his dissent and as strongly suggested by the Supreme Court in *California Motor Transport,* supra, the "sham" exception of the *Noerr-Pennington* Doctrine strips away First Amendment immunity when the judicial process has been abused by the Respondents irrespective of whether Respondents' state court pleadings state a "colorable claim" or an "issue of substance." The Court has stated:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative of judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive

> claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. *But once it is drawn, the case is established that abuse of those processes produced an illegal result,* viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression." (Emphasis added). *California Motor Transport Co v Trucking Unlimited,* supra, 404 US at 513.

Mr. Justice Stewart concurred that the controlling issue was whether the judicial and administrative processes had been abused and used to achieve an illegal, collateral result, e.g. to prevent respondents from accessing the administrative processes. *California Motor Transport Co v Trucking Unlimited,* supra.

In the present case, the illegal, collateral result sought by Respondents in the filing of the state court action was to coerce Westmac, Inc. into joining their price maintenance conspiracy by preventing or delaying sale of the EDC bonds; the Hobson's choice Respondents gave Westmac by delaying sale of the EDC bonds was join the conspiracy or suffer economic destruction. Moreover, Respondents succeeded in their collateral objective: as a result of the filing and pursuit of the litigation (not the ultimate decisions by the trial court and Court of Appeals), the Respondents prevented the timely sale of the EDC bonds, caused Westmac, Inc. in excess of Two Hundred Fifty Thousand Dollars ($250,000) in damages and removed Westmac, Inc. as a competitor in the Clinton County area.

The Court must recognize the District Court dismissed Petitioner's case on a Rule 56 Motion for Summary Judg-

ment and the factual question of whether Respondents' state court litigation was an abuse of process or a "sham" never reached a jury. Instead, the Sixth Circuit Court of Appeals decided that because Respondents' state court litigation contained a "colorable claim" that the activity was entitled to a judicially created presumption of First Amendment immunity which was not, as a matter of fact, rebutted by the memo describing the real purpose of the state court lawsuit: "start a lawsuit—bonds won't sell". This rule exhalts form over substance and ignores the basic reason for the *Noerr-Pennington* shield. As this Court has recognized, the First Amendment protects only "genuine petitioning activity"; it does not and should not protect activity dressed as genuine but which is, in reality, nothing but a "sham". Because an anti-trust defendant employed a clever attorney to plead a "colorable claim" or "an issue of substance" cannot, therefore, in and of itself, cloak that defendant's state court litigation with anti-trust immunity, whether by presumption or otherwise. In this case, the non-sale of the bonds was entirely separate from the constitutionality of the EDC Act, and delaying sale of the EDC bonds put severe economic pressure on Westmac, Inc. to capitulate to Respondents' price maintenance conspiracy which was the specific collateral purpose Respondents were trying to achieve with the institution of the state court lawsuit. Direct evidence of that collateral objective appeared when, in the course of the state court litigation, one of the Defendants suggested to the President of Westmac, Inc. that if Westmac, Inc. would agree to adopt the "uniform" pricing system in the market area the state court challenge to the EDC statute would be dismissed.

The elements for the requisite abuse of judicial process action are present in the facts of the present case, *Three*

Lakes Association v Whiting, 75 Mich App 564, 255 NW2d 686 (1977), and Westmac, Inc. urges the United States Supreme Court to grant its Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals and to adopt the test of the "sham" exception to the *Noerr-Pennington* Doctrine as articulated by Judge Merritt in his dissent because the tort of abuse of judicial process is the heart of the "sham" exception to the *Noerr-Pennington* Doctrine; it encompasses the abuse of the judicial system which lies at the foundation of the "sham" exception to the *Noerr-Pennington* Doctrine. Michigan's tort of abuse of process mirrors the essence of the "sham exception" as follows:

> " 'Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose, and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process.' " *Spear,* supra, at 623. *Three Lakes Association v Whiting,* 75 Mich App 564, 572, 255 NW2d 686, 690 (1977).

Judge Merritt recognized this similarity when he adopted the abuse of process definition of the scope of the "sham" exception. Westmac, Inc. submits the Sixth Circuit's exhaltation of the form of the pleadings over the substance behind the state court action cannot be left standing as the test of First Amendment immunity. The formalistic "sham" exception test employed by the Sixth Circuit Court of Appeals can only invite further misuse and abuse of the already over-burdened judicial system and encourage use of the litigation process itself as a constitutionally protected weapon against potential competitors.

B.

The mere allegation of a "colorable claim" or an "issue of substance" in the state court action, cannot immunize Respondents from anti-trust liability under the First Amendment's Noerr-Pennington Doctrine, particularly, in the context of a Rule 56 Motion.

If the present Petition for a Writ of Certiorari is not granted, anyone who wishes to use state (or federal) court litigation to achieve an illegal, collateral result (anti-trust or otherwise) need only include a "colorable claim" or an "issue of substance" in their pleadings in order to enjoy a constitutional presumption that the action is sheltered by the *Noerr-Pennington* umbrella and is not abusive. More than that, when faced with a Rule 56 motion, a memorandum stating "if this [lobbying] doesn't succeed—start a lawsuit—bonds won't sell" will not suffice to rebut this "constitutional presumption" of non-abuse of the judicial process so as to let a jury decide the issue of whether Respondents' activities were, in fact, "genuine".

In *Hospital Building Co v Trustees of Rex Hospital,* 791 F2d 288 (4th Cir 1986), the Fourth Circuit Court of Appeals recognized a touchstone of *Noerr-Pennington* immunity as being whether defendants' litigation or petitioning activities were "genuine". In so doing, the Fourth Circuit approved the following explanation of the "sham exception":

> Professor Areeda has given this explanation of sham that denies a defendant the benefit of the *Noerr-Pennington* doctrine:
>
> [T]he basic concept, as employed by the Supreme Court, is that the defendant's activity was intended to injure the plaintiff directly rather than through a governmental decision. When the antitrust defen-

> dant had not truly sought to influence a governmental decision, his invocation of governmental machinery is a sham. To be sure, he would always be pleased to obtain a governmental decision against his rival. But where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so was a sham. P. Areeda, Antitrust Law, § 203.1a (Supp. 1982)." *Hospital Building Co,* supra, 292.

Under this measure, Petitioner submits that no clearer statement of Respondents' "real intent" for "sham" litigation, as defined in *California Motor Transport Co,* supra, can exist than a memo which says "start a lawsuit —bonds won't sell", coupled with the "offer" made by Respondent Bowles to dismiss the litigation if Westmac agreed to join the price maintenance conspiracy. While the "sham" exception must be applied with caution to avoid a chilling effect on those who in good faith seek redress in the courts, where facts in the record unequivocally indicate the real intent behind a lawsuit was to achieve a collateral, anti-competitive result, the lawsuit "deserves all the chilling effect the law allows", *Rickardo,* 783 F.2d at 1334, and the form of the pleadings alone cannot be permitted to trigger First Amendment immunity.

This Court has made it clear that summary judgment under Rule 56 should be entered sparingly, particularly in anti-trust cases where motive and intent play an important role.

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination

> that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is not substitute for trial by jury which so long has been the hallmark of "even handed justice." *Poller v Columbia Broadcasting System,* 368 US 464, 473, 82 S Ct 486, 494, 7 L Ed 2d 458, 466 (1962).

Because the applicability of the "sham" exception to Respondents' State court litigation pivots on such an issue of intent in a Rule 56 motion, Petitioner submits the Supreme Court cannot permit the Sixth Circuit's judicially created presumption to stand as the measure of the "sham" exception and to keep Petitioner's case from a jury. The Sixth Circuit's presumption is not supported by the Supreme Court's articulation of the "sham" exception in *California Motor Transport,* supra, nor by case law in the other Circuit Courts of Appeal. In fact, the Sixth Circuit's *Westmac* presumption clouds the threshold test of the "sham" exception, instead of clarifying it. The "real intent" of the Respondents is the threshold test of the "sham" exception, *California Motor Transport,* supra, and this "real intent" cannot be hidden from jury scrutiny behind masks of artful pleadings and clever arguments.

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CONCLUSION

For the reasons set forth above and the serious questions involved in this case, Petitioner, Westmac, Inc. respectfully requests the Court to grant its Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals.

Dated: 11/11/86

Respectfully submitted,

SCHENK, BONCHER & PRASHER

By: Gregory G. Prasher
Attorney for Petitioner

Business Address:

301 College Park Plaza
Grand Rapids, MI 49503
(616) 454-8277

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-1475

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WESTMAC, INC., a Michigan corporation,

Plaintiff-Appellant,

v.

LON SMITH; Individually; SMITH BROS. VELTE & Co., a Michigan corporation; SMITH BROS. VELTE & COMPANY, d/b/a SUNFIELD FARMERS ELEVATOR CO.; BERT POST, IND., MINOR WALTON BEAN Co., a Michigan corporation; FRANK E. BOWLES, IND.; POTTERVILLE ELEVATOR CO.; MID-MICHIGAN FARM & GRAIN ASSC., INC., and all members, stockholders and officers of Mid-Michigan Farm & Grain Association, Inc., Ind.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed July 30, 1986

Before: MERRITT and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

WELLFORD, Circuit Judge, delivered the opinion of the Court, in which PECK, Senior Circuit Judge, joined. MERRITT, Circuit Judge, (pp. 14-20) delivered a separate dissenting opinion.

WELLFORD, Circuit Judge. Plaintiff, Westmac, Inc., has sued the defendants charging antitrust violations. The focus of this appeal concerns defendants' opposition

to plaintiff's effort to obtain special tax benefit bond finanacing of a grain elevator facility in Clinton County, Michigan.[1] Plaintiff appeals from a grant of summary judgment to defendants based on a claimed exemption from plaintiff's antitrust claim known as the *Noerr-Pennington* doctrine. Plaintiff charged defendants with pursuing and conducting lobbying and litigation activities for the express purpose of forcing plaintiff to join an anticompetitive price maintenance conspiracy or, if that failed, to damage plaintiff economically by reducing or destroying its ability to compete. The district court held no genuine issue of material fact existed respecting whether defendants' lobbying and litigation activities were "a genuine attempt to influence official decision making" protected by the *Noerr-Pennington* doctrine. We affirm.

I.

In 1974 the state legislature of Michigan enacted the Economic Development Corporations Act. Mich. Comp. Laws Ann. § 125.1601-125.1636. The statute permits municipalities to form local Economic Development Corporations (EDCs) for the purpose of issuing revenue bonds. The proceeds are used for the construction of privately owned and operated businesses. In February 1981 Westmac approached the Clinton County Economic Development Corporation in order to obtain EDC bonding to assist in the financing of construction of a high speed grain elevator and railroad loading facility in that county. West-

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[1]By stipulation, plaintiff conceded that its "remaining and State law based claims" brought about no "economic damages" beyond the "inception of litigation by the defendant[s]," which is the subject matter of the appeal.

mac obtained initial approval of the project by the Clinton County EDC on February 26, 1981.

On April 3, 1981, defendant Lon Smith wrote other grain elevator operators in the area and urging them to communicate their concerns about the method of financing the new grain terminal to the Clinton County officials and to attend and voice their concerns at public hearings. On May 20, 1981, the Mid-Michigan Farm and Grain Association was established for the stated purpose of promoting the economic welfare and stability of the agricultural industries of Central Michigan. The Clinton County EDC gave final approval of Westmac's project on July 28, 1981. Westmac proceeded to arrange for issuance of the tax benefit bonds.

On August 5, 1981, Mid-Michigan filed suit against the Clinton County EDC in the Clinton County Circuit Court, challenging the constitutionality of the EDC Act. Westmac intervened in that suit as a party defendant. The court upheld the constitutionality of the statute. *Mid-Michigan Farm & Grain Association, Inc. v. Henning,* No. 81-3038-AN (Clinton Co. Cir. Ct. Dec. 10, 1981). The Michigan Court of Appeals affirmed. *Mid-Michigan Farm & Grain Association, Inc. v. Henning,* 175 Mich. App. 735, 339 N.W.2d 243 (1983). Plaintiff filed its antitrust complaint in the district court on December 30, 1981.

II.

Under the *Noerr-Pennington* doctrine, genuine attempts to influence passage or enforcement of laws are immune from antitrust scrutiny, regardless of the anticompetitive purpose behind such attempts. *United Mine*

Workers v. Pennington, 381 U.S. 657, 669-71 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-39 (1961). As the Court stated in *Pennington:*

> . . . The legality of the conduct [in *Noerr*] "was not at all affected by any anticompetitive purpose it may have had," . . . [365 U.S.] at 140—even though the "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors. . .," *id.*, at 138. Nothing could be clearer from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved.

381 U.S. at 669. The right to petition, upon which the doctrine is based, *see Noerr*, 365 U.S. at 138,[2] extends to all departments of government, and therefore governs the access of citizens to courts and administrative agencies. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

On the other hand, the *Noerr-Pennington* doctrine does not protect against improper attempts to influence the government or the courts that are a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *California Motor Transport*, 404 U.S. at 511 (quoting *Noerr*, 365 U.S. at 144). In *California Motor Transport* the respondents sued petitioners on the grounds they conspired to monopolize trade and commerce in the truck-

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[2]The conduct in *Noerr* concerned an alleged conspiracy to monopolize and restrain trade in the long-distance freight business in violation of sections 1 and 2 of the Sherman Act. The truckers alleged that the railroads sought to achieve their illegal goals by conducting a publicity campaign against truckers designed to destroy them. 365 U.S. at 129.

ing industry in violation of the antitrust laws. The respondents alleged petitioners conspired to institute repeated state and federal proceedings to defeat respondents' applications to acquire operating rights or to transfer or register those rights. *Id.* at 509. The respondents' sham theory in *California Motor Transport* was that petitioners on a number of occasions used their resources to harass and deter respondents in their access to administrative and judicial proceedings. The Court distinguished petitioners' activity from the activity in *Noerr*, *Id.* at 54. In *Pennington* the Court had stated that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." 381 U.S. at 670. The *California Transport Motor* Court contrasted attempts to influence public officials from repeated efforts to block competitors from access to adjudicating tribunals, as allegedly occurred in *California Motor Transport*. *Id.* at 511-12. In this latter situation the Justices endorsed examining the purpose or intent of the alleged anticompetitive activities. *Id.*[3] The Court reiterated that when the exercise of first amendment rights is an integral part of conduct that violates a valid statute or constitutes an abuse of process it is not immunized from regulation. *Id.* at 514-15. The Court elaborated that "First Amendment rights may not be used as

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[3]The Court noted that although unethical conduct was insufficient to satisfy the sham exception in *Noerr* when the conspiracy concerned lobbying activities, it can be sufficient when the conspiracy concerns use of adjudicatory processes. 404 U.S. at 512. The Court gave as an example of unethical conduct such activities as perjury, fraud, conspiracy, bribery, misrepresentations, a pattern of baseless, repetitive claims, or other kinds of abuse of process. *Id.* at 512-13.

the means or the pretext for achieving 'substantive evils.'" *Id.* at 515 (citation omitted).

Subsequent cases have attempted to clarify the scope of the sham exception to the *Noerr-Pennington* doctrine. In *Winterland Concessions Co. v. Trela,* 735 F.2d 257, 263 (7th Cir. 1984), the plaintiff alleged that defendant employed various tactics to deny plaintiff a judicial determination or definition of defendant's property rights. The court, in attempting to define the parameters of the sham exception, noted that litigation may be used for improper purposes, such as suppressing competition. The panel defined sham litigation as litigation filed by an individual *solely* to harass and not to win a favorable judgment. *Id.* (quoting *Grip-Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466, 472 (7th Cir. 1982), *cert denied,* 461 U.S. 958 (1983)). The court carefully distinguished between an anticompetitive purpose, which the *Noerr* doctrine does protect, and the purpose to harm competitors "not by the *result* of the litigation, but by the simple fact of the *institution* of the litigation." *Id.* at 264 (quoting *Gainesville v. Florida Power & Light Co.,* 488 F.Supp. 1258, 1265-66 (S.D. Fla. 1980). Since plaintiff alleged defendant's purpose was to eliminate plaintiff and not to obtain a judgment, the court reversed the district court's dismissal of plaintiff's antitrust claim.

In *Omni Resource Development Corp. v. Conoco, Inc.,* 739 F.2d 1412 (9th Cir. 1984), the defendant successfully obtained a preliminary injunction against plaintiff in a state trespass suit. *Id.* at 1413. The plaintiff alleged that defendant used false and fraudulent affidavits in the suit in a scheme to restrain trade. The court assumed this

activity was at least tortious under state law, but nevertheless determined it to be protected under the first amendment unless "undertaken solely to interfere with free competition and without the legitimate expectation that such efforts will in fact induce lawful government action." *Id.* at 1413 (citing *Noerr*, 365 U.S. at 144.) The Ninth Circuit further noted that when the antitrust activity concerns only a single baseless suit,[4] rather than a pattern of repeated filings, the sham exception does not apply unless the baseless suit has other characteristics of grave abuse. *Id.* at 1414.[5] The court affirmed the trial court's judgment on the pleadings in favor of defendants.[6] *See also Cleveland v. Cleveland Electric Illuminating*, 734 F.2d 1157 (6th Cir.), *cert. denied*, 105 S.Ct. 253 (1984).

In the recent case of *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484 (8th Cir. 1985), the court reversed the district court's order denying defendant's motion to grant summary judgment because the panel found that the *Noerr-Pennington* doctrine protected defendant's conduct. Defendants had opposed a bond issue, the proceeds from which plaintiff sought to pay its corporate

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[4]Plaintiff urges this court to resolve the question whether the sham exception requires more than one baseless suit. *See Cleveland v. Cleveland Electric Illuminating Co.*, 734 F.2d 1157, 1162-63 (6th Cir.), *cert. denied*, 105 S.Ct. 253 (1984). But in view of our agreement with the district court's determination that defendant's state suit was not baseless, the issue is not before the court.

[5]One example of grave abuse is litigation that is an integral part of a larger antitrust conspiracy. 739 F.2d at 1415.

[6]The court emphasized that the judgment resulting from defendant's suit, not the mere filing of the suit, was the cause of plaintiff's harm. 739 F.2d at 1414.

debt. The sale of the plaintiff's business was contingent on the bond issue. *Id.* at 486. Defendants unsuccessfully lobbied against the bond issue with local officials. They subsequently filed a suit and later perfected an appeal in state court challenging the propriety of the bond issue. *Id.* As an alleged result of defendants' actions, the bonds were not issued and plaintiff went into bankruptcy. *Id.* The court held the sham exception was inapplicable as a matter of law, concluding that the key to the sham exception is "an improper interference with governmental processes." *Id.* at 487. It suggested the "improper interferference" to which it referred is "illegal reprehensible practices such as perjury, fraud, conspiracy with or bribery of governmental decision makers, or misrepresentation, or is so clearly baseless as to amount to an abuse of process."[7] *Id.* (quoting *Chest Hill Co. v. Gluttman,* 1981-2 Trade Cas. (CCH) ¶ 64,417 (S.D. Ohio May 29, 1981)); *See also Energy Conservation, Inc. v. Heliodyne, Inc.,* 698 F.2d 386, 388 (9th Cir. 1983) ("[T]he application of the antitrust laws need not be waived when the bringing of a suit is *solely* an effort to interfere directly with a competitor.") (emphasis added); *Alexander v. National Farmers Organization,* 687 F.2d 1173, 1195 (8th Cir. 1982) ("The sham exception generally involves governmental contacts which are not a genuine attempt to influence official decision making, but instead are *merely* an attempt to inter-

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[7]Some language in *Razorback* arguably suggests that a party's motive in bringing a suit is never relevant. *See* 761 F.2d at 488 ("Defendants' motive may have been selfish or altruistic or mixed; that is immaterial. Regardless of motive, defendants' actions are clearly within the ambit of First Amendment protection . . . ."). *But see California Motor Transport,* 404 U.S. at 511-12.

fere directly with the business relationships of a competitor.") (emphasis added), *cert. denied*, 461 U.S. 937 (1983); *Associated Container Transp. (Australia) Ltd v. United States*, 705 F.2d 53, 58 (2d Cir. 1983) ("The *Noerr-Pennington* doctrine . . . does not . . . shield those who attempt to abuse the governmental process for the purpose of injuring a competitor.").

III.

We find persuasive the reasoning in *Razorback* that states the sham exception does not apply merely because a party files a suit with the principle purpose of harming his competitor. The first amendment, as expressed in the *Noerr-Pennington* doctrine, protects even strongly expressed anticompetitive sentiments. At the same time, we are cognizant that the Supreme Court rule in *California Motor Transport* that intent is relevant when a party allegedly filed a suit without concern for obtaining a favorable judgment, but only directly to harm a competitor. As the Fifth Circuit recently stated:

> The problem stems in part from the fact that determining whether the petitioning conduct was a sham often involves questions of motive or subjective intent. For example, the conduct protected by the Court in *Noerr* was an advertising campaign by the railroads directed against the trucking industry and intended to persuade the state legislature to enact laws detrimental to truckers. If the ad campaign had been instituted for the purpose of injuring the trucking industry directly, rather than in an effort to persuade the legislature to take action, the activity would have been a sham. Similarly, if a competitor instituted an action against his rival before a regulatory agency in order to force him to defend against the

> action rather than in hopes of a favorable agency ruling, the activity would not be bona fide petitioning conduct. Developing criteria to separate legitimate efforts from others is not simple. *See generally* P. Areeda, *Antitrust Law* ¶ 203 (1982 Supp.).

Greenwood Utilities Commission v. Mississippi Power Co., 751 F.2d 1484, 1498 n.9 (5th Cir. 1985).

We also agree with the rationale of *Razorback* that the sham exception is a "narrow one" and "is applicable when the activity in question corrupts governmental processes to such an extent that it constitutes access barring conduct of the sort described in *California Motor.*" 761 F.2d at 487 (citing *Woods Exploration & Producing Company v. Aluminum Company of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)). We further agree with that court's reasoning that "the key to the 'sham exception' is an improper interference with governmental process." *Id.* at 487.[8]

Determining whether a party who filed suit was indifferent to obtaining a favorable judgment may often be a difficult question of fact. *Accord Grip-Pak*, 694 F.2d at 472. We hold that when a lawsuit raises a legal issue of genuine substance, it raises a rebuttable presumption that it is a serious attempt to obtain a judgment on the merits instead of a mere sham or harassment. The first amendment interests concerned and the case law discussed earlier

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[8] *Razorback's* facts are in many ways analogous to those in this case. A group of competitors in *Razorback* opposed the bond issue for a competitor. When the county judge approved the bond issue, they challenged this action in court, alleging that the bond issue violated the Arkansas constitution. They lost in the trial court and appealed.

support placing the evidentiary burden on the antitrust plaintiff to prove that the action of the defendant comes within the sham exception to *Noerr-Pennington* in this kind of case.

IV.

Application of these principles to the facts of this case suggest that the defendants' activities in pursuing the lawsuit do not fit within the sham exception. The district court emphasized that the Michigan courts did not treat defendants' suit as without merit or a mere sham. The state court referred to the suit as a "fundamental and well articulated challenge to the constitutional validity of the Economic Development Corporations Act." On these essentially undisputed facts we find defendants' state suit to have raised a substantial issue of state law. We may therefore presume that defendants filed the suit as a genuine attempt to obtain a judgment on the merits, even if they also intended to prevent plaintiff from obtaining a tax and economic benefit as a potential competitor.

Plaintiff has not rebutted this presumption. Plaintiff principally bases its argument that the sham exception applies on a memorandum written by one defendant that states in part: "If this [lobbying activity] doesn't succeed, start a lawsuit—bonds won't sell." The memorandum to this defendant's lawyer also pointed out that a "requirement" of the EDC was to serve the "public purpose" and that this needed to be "our focus." It emphasized "we need local support," and that the act was "unconstitutional —no equal protection of law," and it directed that the attorney "start legal action when county commissioners give approval."

Although this statement may support plaintiff's theory of defendants' anticompetitive animus, it does not alter the protected nature of their litigation activities. This memo does memorialize a series of efforts to prevent plaintiff from selling the bonds. The memo suggests that if these efforts did not succeed, then the defendants should institute a lawsuit challenging the constitutionality of the bonds. But we agree with the district court's view that the memo does not raise a sufficient fact issue regarding the intent of defendants to preclude granting them summary judgment.[9]

The district court took full account of this court's admonition in *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211, 213 (6th Cir. 1977) (per curiam): "[S]ummary judgment is rarely an appropriate response to antitrust litigation, since such litigation so frequently turns upon disputed issues of fact." It properly also noted, however, that summary judgment is avail-

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[9]It defies common sense to suggest defendants did not seek a favorable judgment. A favorable judgment declaring the state law unconstitutional would have prevented the sale of the bonds, which was defendants' allegedly anticompetitive purpose. The record on appeal does not suggest that this is a case in which " . . . the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation." *Grip-Pak*, 694 F.2d at 472 (Judge Posner discussing examples of when stakes would suggest defendant's purpose was not to obtain a favorable judgment).

Other circumstances indicate that the state court action was not a sham or in any way an abuse of the judicial process. Defendants promptly stipulated that plaintiff might intervene. There was also a further agreement providing that the Michigan court give expedited consideration to the defendants' suit challenging the constitutionality of the Michigan law authorizing the EDC. These arrangements indicate that the defendants' state suit was not an effort to defeat plaintiff's EDC petition by delay, harassment, or any kind of "reprehensible practice."

able in proper circumstances in antitrust cases when there are no disputed material facts, or if the issue presented is clearly a question of law. *Id; see also Razorback Ready Mix Concrete v. Weaver*, 761 F.2d 484 (8th Cir. 1985); *Comet Mechanical Contractors, Inc. v. E. A. Cowen Construction, Inc.*, 609 F.2d 404, 405 (10th Cir. 1980). Here the parties have pursued discovery and the facts are clear regarding the circumstances of the filing of the suit and that the state courts consider the suit to present substantial issues, even though defendants were not ultimately successful. This court has approved granting of summary judgment concerning antitrust claims under such circumstances. *See Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 947-48 (6th Cir. 1983).[10]

We find that granting of summary judgment in this case was not error. We assume that defendants' purpose "was either to stop or delay sale of the EDC bonds or prevent the EDC financing" as asserted by plaintiff. But

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[10]We do not consider the conversation between plaintiff's president and Bowles, a former member of the Mid-Michigan Farm and Grain Association, that upon certain conditions the latter "believed" or "felt" that he might get the group to drop its appeal and effect a settlement to a material circumstance precluding a grant of summary judgment. In granting summary judgment the district court gave plaintiff's contentions the benefit of the doubt. It assumer an "attempt to influence official decision making" and "anti-competitive purpose" on the part of defendants, but it held this behavior to be protected and exempted from antitrust claims because defendants' actions, particularly in bringing about the constitutional challenge in court, were not an "abuse of governmental process," nor "unlawful lobbying activities, nor "sham" litigation. The district court held that to come within the sham exception to the *Noerr-Pennington* doctrine, which protects the important first amendment right of petition, the legal action must be shown to be "baseless, initiated without probable cause, or tainted by fraud, perjury, bribery, or other practices constituting a corruption of the judicial process."

plaintiff concedes that the "Clinton County Circuit Court Judge did not treat the [defendants'] case as a (sham)." Instead the state court viewed the case as raising an important legal question. The substance of the defendants' state case raises a rebuttable presumption that their lawsuit was a genuine attempt to obtain a favorable judgment.[12] Plaintiff does not allege facts that can rebut this presumption.

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[11]We acknowledge, however, plaintiff's contention that evidence which "supports" its sham theory was not before the state judge, but the contention was considered by the district court, which concluded: [p]laintiffs in the present case present no facts to support an inference that the defendants abused the judicial process. . . . J.A. at 99.

[12]The dissent implies that by creating the presumption in the present case we are immunizing from government regulation the challenged conduct which concededly may have an anticompetitive effect. But we have not "immunized" defendants' conduct in the present case because we have afforded the plaintiff an opportunity to demonstrate that defendants' state court suit was something other than a serious challenge to the validity of the state law relied upon by plaintiff to obtain a special tax benefit. The dissent asserts that we should determine whether the defendants' action and motivation in bringing the state court challenge amounted to an "abuse of process." *See Grip-Pak*, 694 F.2d at 471-72. We do not disagree that if plaintiff could establish that defendants' actions constitute the tort of abuse of process, in the sense that defendants' suit corrupted or improperly interferred with the judicial process, that the sham exception does not apply. *See Razorback*, 761 F.2d at 487; *Assoc. Container Transp.*, 705 F.2d at 59 (states that "abuses of the governmental process" such as "misrepresentations" or "a pattern of baseless repetitive claims may induce antitrust liability"). We merely are creating an evidentiary presumption to facilitate the applicability of the sham exception. We would also agree with the dissent's acknowledgement that defendants probably would admit that they filed their state court action with an intent to impede or damage plaintiff's effort to construct a competing grain elevator aided by special statutory benefits, and that such intent is insufficient as a matter of law to take this action out of the protection of the *Noerr-Pennington* doctrine. *See* dissent at n.4.

Accordingly, we AFFIRM the district court's grant of summary judgment.

MERRITT, Circuit Judge, dissenting. In 1961 Justice Black wrote "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). Since then the federal courts have struggled to give specific meaning to the *Noerr-Pennington* doctrine's sham exception. We need a definition of the sham exception that is clear and analytically sound as well as functional.

I do not take issue with the Court's general view of the *Noerr-Pennington* sham exception—that when an antitrust plaintiff claims his defendants conspired to restrain trade by filing a sham suit against a competitor, application of the sham exception turns on whether the defendants genuinely sought a favorable judgment in their action or were seeking to inflict antitrust injury on a competitor by the litigation process itself, regardless of the suit's outcome. I do not agree, however, with the rule that the existance of an "issue of substance" or "colorable claim" should be held to create a constitutional presumption—rebuttable or irrebuttable—of no judicial abuse of process, and hence no sham. In this dissent I would make the same point that the Seventh Circuit made in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2430 (1983). The Court held that if lawsuits raising colorable claims

> were immunized from government regulation by the First Amendment, the tort of abuse of process would be unconstitutional—something that, so far as we know, no one believes. The difference between abuse of process and malicious prosecution is that the former does not require proving that the lawsuit was brought without probable cause. If abuse of process is not constitutionally protected, no more should litigation that has an improper anticompetitive purpose be protected, even though the plaintiff has a colorable claim.
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> . . . .
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> . . . The existence of a tort of abuse process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; and if the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense, it becomes a matter of antitrust concern.[1]

694 F.2d at 471-72 (citations omitted).

Rather than relying on the panel's presumption rule in defining a sham, I would use the elements of the tort of abuse of process, as defined by Dean Prosser:

> The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required;

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[1]This analysis was criticized by Handler & De Sovo. *The* Noerr *Doctrine and its Sham Exception*, 6 Cardozo L. Rev. 1, 33-40 (1984), but the result it reached was accepted by Kintner & Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the* Noerr-Pennington *doctrine*, 17 U.C.D. L. Rev. 549, 575-76 (1984).

> and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

W. Prosser, Handbook of the Law of Torts § 121 at 857 (4th ed. 1971). The Restatement of Torts capsulizes abuse of process as follows:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

Restatement (Second) of Torts § 682 (1977).[2]

A commentator has explained the use of the elements of the tort of abuse of process in defining *Noerr-Pennington's* sham exception:

> The gravaman of the tort of abuse of process is the initiation or instigation of a legal proceeding against an individual to secure an objective other than the judgment ostensibly sought in that proceeding. The ability to maintain the action does not depend either on the absence of probable cause for the initial proceeding or on its termination in favor of the abuse of process plaintiff. However, the plain-

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[2]Although this section of the Restatement does not expressly require an improper affirmative act in furtherance of the illegitimate purpose (as does Dean Prosser), the comments and illustrations make clear that such an act is required:

> *A* is a dangerously insane person. *B*, her son, instigates lunacy proceedings against her, seeking to have her confined for the protection of herself and others. His motive in doing so is to succeed to the control of her property after she is committed. This is not abuse of process.

Restatement (Second) of Torts § 682 illustration 4.

tiff must show that the defendant instituted the litigation with the purpose of achieving a "collateral" objective, and that he committed a specific act—other than those acts incidental to the normal use of the court or agency—directed at attaining that objective. A paradigmatic case of abuse of process is the initiation of a lawsuit against the abuse of process plaintiff to compel him to pay a debt not the subject of the complaint (the collateral purpose) and an express offer to terminate or abstain from litigation if the plaintiff pays the debt (the specific act). Abuse of process rests on the theory that no legitimate social interest is served by allowing the employment of even meritorious litigation by the defendant when his real aim is the nonadjudicatory objective, *and* when proof of specific conduct taken to achieve that objective limits the dangers of inquiry into his subjective purpose.

There are analogous situations in which litigation, even if instituted with probable cause, could be used to achieve specifically evidenced anticompetitive ends collateral to the ostensible purpose of the litigation, and in which antitrust sanctions would be warranted. For example, party *A* and party *B* could conspire to threaten litigation against party *C*, and could expressly offer to forego the litigation if *C*, an active competitor, participated in a price-fixing scheme or abandoned an aggressive advertising campaign.

Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 Harv. L. Rev. 715, 732-33 (1973) (emphasis in original); *see also Chest Hill Co. v. Guttman*, 1981-82 Trade Cases ((CCH) ¶ 64,417 at 75,057-59 (S.D. Ohio May 29, 1981); *Associated Radio Service Co. v. Page Airways, Inc.*, 414 F.Supp. 1088, 1096 (N.D. Tex. 1976).

Under this analogy, if the defendants initiated their state court action with the primary[3] purpose of achieving some anticompetitive result collateral to the ostensible purpose of the litigation and, in furtherance of that collateral purpose, committed some act not normally incident to litigating such an action, defendants' actions amounted to sham litigation and are not protected from liability by the *Noerr-Pennington* doctrine.

This way of defining the sham exception accords with what we know about the litigation process. As lawyers we know that it is not uncommon for parties to commercial litigation (even some who win) to be motivated to file their actions, not by the prospect of winning, but by the harassment value of the litigation. If the defendants possess a claim with a reasonable basis but the antitrust plaintiff can show that the defendants were using the litigation process itself as a weapon, the court should rule that the defendants' use of the process was a sham and was not genuine petitioning for redress of grievances—assuming a specific overt act of the type described above. Again, assuming an overt act, this definition would exclude from *Noerr-Pennington's* protection the case of a group of defendants who conspire to bring a colorable claim against a competitor, but who leave a paper trail showing that they did not know of or care about the suit's basis in the law and that they expected that the competitor would be driven out of the market by factors related to the litigation process itself—cost, delay, damage to reputation, decreased sales, etc—long before any judgment in the action is rendered.

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[3]See Restatement (Second) of Torts § 682 comment b.

Applying this definition to this case, I believe that the plaintiff has alleged sufficient facts to support the conclusion that defendants were attempting to use the litigation process, as opposed to the judgment sought in the suit, as a weapon against plaintiff.[4] Plaintiff discovered a memo from one of the defendants to his lawyer stating: "If this [lobbying activity] doesn't succeed, *start a lawsuit—bonds won't sell.*" (Emphasis added.) Another memo stated: "A letter I wrote to area elevator in August 1981 pleading for more contributions has two inflammatory references to [(*if nothing else, we'll delay sale of the bonds*)]." (Emphasis added.) Plaintiff asserts that one of the defendants' "sham purposes" behind filing the action was to coerce plaintiff into joining defendants' price fixing conspiracy. Plaintiff alleges that before defendants filed their action, one of the defendants met with the plaintiff's principal and asked him to implement certain "standard charges" at plaintiff's proposed elevator in order to obtain "uniformity in certain charges." Further, plaintiff alleges that while the appeal in defendants' state court action was pending, one of the defendants told plaintiff's representatives that if plaintiff would agree to implement a certain guaranteed system of prices to protect defendants' prices in the market, defendants would drop their appeal.

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[4]Plaintiff's briefs assert that defendants filed their action with the intent to damage plaintiff's efforts to construct a grain elevator that would compete with defendants' elevators. Indeed, defendants would probably admit that this was their intent. However, as discussed by Judge Wellford above, this intent does not (contrary to plaintiff's position) make a sham out of defnedants' lawsuit. Nevertheless, even though plaintiff was laboring under a mistaken view of the sham exception, plaintiff managed to bring forward enough facts to rebut the panel's presumption.

Thus, in short, plaintiff alleges that defendants were motivated to file their action primarily by the collateral anticompetitive purposes of forcing plaintiff to join a price fixing scheme and destroying the marketability of the EDC bonds. Plaintiff further alleges that at least one defendant committed the overt act of stating, in effect, that defendants' action would be terminated if plaintiff joined defendants' price fixing arrangement. Thus, according to plaintiff's allegations, defendants possessed the requisite collateral purpose and committed an affirmative act in furtherance of that purpose. Such facts, if proven, require that defendants' state court action be held to be a sham.

This case was originally decided by the District Court under an erroneous definition of the sham exception. Therefore, rather than attempting to determine from the record and argument whether defendants' purpose and actions do indeed come within the sham execption, as properly defined, I would reverse the District Court's judgment and remand for reconsideration in the light of the discussion above.

No. 85-1475

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WESTMAC, INC., A MICHIGAN CORPORATION,

Plaintiff-Appellant,

v.

LON SMITH, ET AL.,

Defendants-Appellees.

ORDER

(Filed September 18, 1986)

BEFORE: MERRITT and WELLFORD, Circuit Judges, and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman, Clerk

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WESTMAC, INC., a Michigan corporation,

Plaintiff,

v

LON SMITH, individually, SMITH BROS. VELTE & COMPANY, a Michigan corporation, SMITH BROS. VELTE & COMPANY, D/B/A SUNFIELD FARMERS ELEVATOR CO., BERT POST, individually, MINOR WALTON BEAN COMPANY, a Michigan corporation, FRANK E. BOWLES, individually, POTTERVILLE ELEVATOR COMPANY, a Michigan corporation, MID-MICHIGAN FARM AND GRAIN ASSOCIATION, INC. and all members, stockholders and officers of Mid-Michigan Farm and Grain Association, Inc., individually,

Defendants.

File No.
G 81-971 CA

PLAINTIFF'S FIRST AMENDED COMPLAINT

NOW COMES plaintiff by its attorneys, Ward, Schenk & Boncher, and as and for its first amended complaint states as follows:

COUNT I

JURISDICTION AND VENUE

1. The jurisdiction of this Court to hear Count I of this Complaint is based upon the original jurisdiction of the Court to hear "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restrain and monopolies" and as hereinafter set forth, this controversy involves §§ 1 and 2 of the Sherman Act (15 USC §§ 1 and 2, Act of July 2, 1890, Ch. 647 §§ 1 and 2, 26 Stat. 209 as amended); and §§ 1, 4, 13, 14, 15, 22, 24 and 26 of the Clayton Act (15 USC §§ 4, 13, 14, 15, 22, 24 and 26, 38 Stat. 730, 731, 736 and 737 as amended). Plaintiff sues for appropriate injunctive relief and to recover treble damages which plaintiff has sustained because of the violations by defendants of the above cited statutes, plus costs of suit and reasonable attorney's fees.

2. This Court has pendent jurisdiction of Count II hereof which alleges violations of State common law and statutory law.

3. Each defendant resides, maintains an office, transacts business, is found or has an agent within the Western District of Michigan and venue is conferred upon this Court by 15 USC § 22.

PLAINTIFF

4. Plaintiff is, and at all times hereinafter mentioned was, a corporation organized under and by virtue of the laws of the State of Michigan, and at the times mentioned in this Complaint, plaintiff was engaged in the business of

marketing, buying, selling, drying and transporting agricultural commodities. Plaintiff further alleegs that it was engaged in interstate commerce between the various states in carrying on its business.

DEFENDANTS

5. Defendant, Lon Smith, is a resident of Eaton County, Michigan, within the Western District of Michigan, is a stockholder and officer of defendant, Smith Bros. Velte & Company (hereinafter Velte), is an officer and/or stockholder of defendant, Smith Bros. Velte & Company, d/b/a Sunfield Farmers Elevator Company (hereinafter Sunfield), and is a member and/or officer and/or stockholder of defendant, Mid-Michigan Farm and Grain Association, Inc. (hereinafter Mid-Michigan).

6. Defendant, Velte, is a Michigan corporation maintaining an office and transacting business in the Western District of Michigan, is doing business as Sunfield Farmers Elevator Company and is engaged in the business of marketing, buying. selling and transporting agricultural commodities. Said defendant, Velte, is engaged in interstate commerce or affects interstate commerce between the various states in carrying on its business.

7. Defendant, Bert Post, is a resident of Eaton County, Michigan, within the Western District of Michigan, and upon information and belief is a stockholder and officer of defendant, Minor Walton Bean Company (hereinafter MWB), and is a member and/or stockholder and/or officer of defendant, Mid-Michigan.

8. Defendant, MWB, is a Michigan corporation maintaining an office and transacting business in the West-

ern District of Michigan, and is engaged in the business of marketing, buying, selling and transporting agricultural commodities. Defendant, MWB, is engaged in interstate commerce or affects interstate commerce between the various states in carrying on its business.

9. Defendant, Frank E. Bowles, is a resident of Eaton County, Michigan, within the Western District of Michigan, is a stockholder and officer of defendant, Potterville Elevator Company (hereinafter Potterville), and is a member and/or officer and/or stockholder of defendant, Mid-Michigan.

10. Defendant, Potterville, is a Michigan corporation maintaining an office and transacting business in the Western District of Michigan, and is engaged in the business of marketing, buying, selling and transporting agritural commodities. Defendant, Potterville, is engaged in interstate commerce or affects interstate commerce between the various states in carrying on its business.

11. Defendant, Mid-Michigan, is a Michigan corporation maintaining an office and transacting business in the Western District of Michigan.

12. Unnamed defendants are those other members, shareholders, officers or agents of defendant, Mid-Michigan, whose exact identity is presently unknown to plaintiff and other individuals or corporations unknown to plaintiff but whom plaintiff is informed and believes have engaged in the conspiracy and acts herein complained of.

GENERAL ALLEGATIONS

13. Plaintiff, Westmac, Inc., is and has been for a number of years a purchaser, marketer and shipper of

agricultural commodities (in particular, grain) offering competent drying and storage services to its farm suppliers and with principal offices in Newaygo County, Michigan, and has been and is involved in interstate commerce while conducting its business activities through and without Central and Western Michigan.

14. Prior to February, 1981, plaintiff sought to expand its grain purchasing and marketing operations by building a grain storage, drying and transportation facility in Eagle Township, Clinton County, Michigan, within the Western District of Michigan.

15. Plaintiff's decision to build such facility was based upon an analysis of market needs and opportunities together with a determination of financing available for the project.

16. Subsequently, plaintiff purchased real estate, secured necessary financing, entered into contracts with a railway transportation company, construction companies, machinery suppliers and others to build such grain storage, drying and transportation facility.

17. The commodities which are the subject of this Complaint move regularly in interstate commerce. The conspiracy hereinafter alleged operated directly on these commodities in connection with interstate shipment and thereby directly restrained interstate commerce within the meaning of the Sherman Act and the Clayton Act.

FEDERAL ANTI-TRUST VIOLATIONS

18. Prior and subsequent to the commencement of the building of plaintiff's facilities in Eagle Township,

Clinton County, Michigan, (the exact dates being unknown to plaintiff) defendants did individually and together engage in an unlawful combination conspiracy to restrain interstate commerce and/or to fix prices in the storage, drying, sale and transportation of grain and other commodities, combined and conspired to monopolize such interstate commerce and attempted to monopolize such trade and commerce in violations of §§ 1 and 2 of the Sherman Act (15 USC §§ 1 and 2), and acted in further violations of §§ 13, 14, 22, 24 and 26 of the Clayton Act.

19. Such violations include among other things the following:

a. Prior and subsequent to the commencement of the building and operation of plaintiff's facilities, the defendants did unlawfully and in combination agree and conspire to agree with respect to a series of prices including prices paid to farmers for commodities and prices charged to farm suppliers for such services as accepting, storage, drying and returning grain in order to lessen competition and restrain trade. Said defendants did further conspire with themselves and others and did unlawfully agree to institute a pricing system known as a "two-price" system resulting in higher prices being paid among the conspirators for grain than to other suppliers to lessen competition and restrain trade.

b. The defendants did individually and together conspire to monopolize trade and commerce in the Central Michigan area by excluding elevator operator competition including specifically by illegally conspiring and attempting to exclude plaintiff's elevator operation from the Central Michigan area and did further attempt to invite and

then coerce plaintiff into joining defendants' price fixing conspiracy in restraint of trade in interstate commerce by threatening and then attempting to exclude plaintiff from the trade area. Such actions occurred in at least the following ways among others:

i. Defendants learned of plaintiff's intention to build a grain elevator in the Central Michigan area in January or February of 1981, and upon learning of the plaintiff's intentions did invite plaintiff to join in a price fixing conspiracy.

ii. When plaintiff insisted upon its refusal to discuss price fixing and its right to conduct business in its own properly competitive fashion, defendants did conspire to fraudulently convince other elevator operators and farmers located within the County of Clinton to oppose the Westmac project but with a motive to protecting their own grain, storage and transportation facilities (including a new rail transportation facility then being constructed by defendant Velte) and monopolizing the trade by excluding plaintiff because plaintiff posed the greatest competitive threat to these defendants.

iii. Defendants did individually and together combine to conspire to form a sham corporation to bring and prosecute sham litigation against plaintiff for the continuing purpose of attempting to coerce plaintiff into joining the unlawful price fixing conspiracy and for the purpose of restraining and monopolizing commerce, including interestate commerce, within the Western District of Michigan, and specifically within the area of plaintiff's facilities.

iv. The defendants did combine and conspire to continue their sham litigation even after said liti-

gation had been defeated in the lower courts for the State of Michigan by prosecuting an appeal when they believed the appeal was without merit and for the purpose of delaying the issuance of Economic Development Corporation bonds to fund plaintiff's project with a view to causing plaintiff such economic harm that it would be unable to continue operation of its Central Michigan facilities and for the purpose of causing plaintiff to either lose or abandon said facilities.

v. The defendants did otherwise jointly attempt to restrict or inhibit the building and operation of plaintiff's competitive grain transportation and storage facility.

vi. Defendants did conspire and combine to appear before various administrative bodies opposing such things as zoning, tax abatement, and the like with respect to plaintiff's project presenting untrue arguments and with the real motive to restrain and monopolize commerce within the Central Michigan area, and specifically within the area of plaintiff's facilities.

vii. The defendants, Smith, Velte, Bert Post, MWB, Frank Bowles, and Potterville, formed defendant, Mid-Michigan, with the purpose and as a combination to restrain trade and lessen competition among commercial grain dealers in the Central Michigan area and to exclude plaintiff from operating in the Central Michigan area or in the alternative, to coerce plaintiff into joining the combination and conspiracy to restrain trade and monopolize the commodities business and interestate commerce in the Central Michigan area.

c. Threatening, conspiring and refusing to deal with farmers or agricultural customers or potential customers of plaintiff either in whole or in part;

d. Acting in combination and in conspiracy in an attempt to prevent plaintiff from obtaining tax incentives provided and available to plaintiff by the laws of the State of Michigan;

e. Combining and conspiring to fix prices and combining and conspiring to form a corporation with the ability and purpose to fix prices and lessen competition;

f. The maintenance by defendants of fixed and non-competitive prices for grain storage, drying, and transportation;

g. Communicating with one another and advising one another with respect to current and future charges for the drying, storage, sale and transportation of commodities, including grain;

h. Advising and consulting by defendants with and between each other with respect to legal action or threats of legal action in order to prevent competition by plaintiff and to restrain interstate commerce;

i. Establishing or attempting to establish area prices concerning the sale, drying, transportation or shipment of commodities, including grain;

j. Knowingly disparaging the quality of plaintiff's products, plaintiff's services, plaintiff's business and reputation and seeking to convince prospective customers the plaintiff's service, products and reputation were inferior, notwithstanding defendants' knowledge of the falsity of such assertions;

k. Conspiring to and fixing prices for the sale, drying, transportation and storage of commodities, including grain;

l. Maintaining a system of fixed prices in accordance with the "standards in the community" as admitted by a party who, on information and believe, is one of the members of defendants at a hearing before the Eagle Township Board on or about December 7, 1981;

m. Discriminating in prices by refusing services to present and prospective customers of plaintiff;

n. Conspiring and refusing to deal with present and prospective customers of plaintiff unless all business transactions involving agricultural products were made through and with defendants, thereby effecting an illegal tying arrangement.

o. Disparaging plaintiff's management abilities to interim lending sources of plaintiff who loaned funds to construct the facility at Eagle Township with a view to causing loss of credit to plaintiff and the consequent loss of the facilities.

20. The combinations and conspiracies herein complained of have been in continuous existence for a number of years, and have been participated in for varying periods and in varying degrees by each of the defendants herein named, and also as plaintiff is informed and believes, by a large number of individuals or companies not named as defendants herein.

21. In furtherance of the aforesaid combination, agreement and conspiracy, each and all of the defendants and co-conspirators have committed or acquiesced in overt

design to further one or more of the objects to monopolize or restrain trade by participating in one or more of the violations as alleged in paragraph 19.

22. The actions of the defendants have had the effect of substantially lessening competition and tending to create a monopoly in interstate trade and commerce in commodities, in violation of the anti-trust laws of the United States.

23. The aforesaid unlawful condition, agreements and understandings were in effect at all times herein and were a proximate cause of the damages to plaintiff.

EFFECTS OF THE VIOLATIONS

24. The offenses hereinabove alleged have had the following effects and have proximately caused the following damages to plaintiff:

a. The credit rating of plaintiff has been potentially impaired;

b. Plaintiff was required to pay higher interest rates for financing than plaintiff otherwise would have had to pay;

c. Plaintiff has incurred legal and other expenses in defending legal actions, the purposes of which were to restrain trade, lessen competition and otherwise injure plaintiff;

d. Farmers and agricultural producers dealing with defendants have been prevented from obtaining competitive prices for storage, drying and transporting commodities;

e. Actual and potential competition has been substantially lessened and the tendency toward monopoly

increased throughout the counties of Eaton, Clinton and Ingham, all within the Western District of Michigan;

f. A restraint has been placed upon the business of plaintiff;

g. Plaintiff's reputation and good will have been substantially curtailed, impaired, interfered with and/or damaged.

25. All of the aforesaid acts of defendants and said co-conspirators were done maliciously, willfully, knowingly, unlawfully and without just cause or provocation, with the unlawful and illegal intent, purpose and object restraining and preventing plaintiff from exercising an essential necessary part of their lawful trade or business in interstate trade or commerce; preventing the plaintiff from rendering to its customers in interstate trade or commerce the services necessary and essential for the continuation of plaintiff's business and for the purpose of unlawfully and illegally eliminating said business of plaintiff in interstate commerce.

26. All of the aforesaid acts of the defendants were in violation of the provisions of Title 15, USCA § 1, *et seq,* and in particular, the Acts of Congress of July 2, 1890 and October 15, 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act and the subsequent acts of Congress, amendatory and supplementary.

27. As a result of the aforesaid acts, the plaintiff has sustained damages in the amount of $250,000.00, which damages are continuing and increasing, and is entitled to recover under the Sherman Anti-Trust Act and the Clayton Act, threefold the amount of said damages, to-wit: $750,000.00, and as may be continued and increased.

28. The acts of the defendants and co-conspirators herein are continuing and defendants threaten to continue to commit such acts in the future, all of which will cause plaintiff to continue to suffer substantial harm and damage; and unless this Court restrains defendants from the continuance of the said wrongful and unlawful acts, plaintiff will be without remedy and will suffer the loss of its investment in its business and an action at law for damages will not avail it and plaintiff will be compelled to bring a multiplicity of suits.

29. Plaintiff is, thus, without any adequate remedy at law.

30. Plaintiff is entitled to reasonable attorney's fees pursuant to the Sherman Act and the Clayton Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that:

1. The defendants and the agents and officers of each of them and all persons combining with or acting in concert with them or under their direction be perpetually and during the pendency of this action restrained and enjoined from conspiring and combining to interfere with the free exercise by plaintiff of its business;

2. That plaintiff be awarded judgment against defendants in the amount of $750,000.00 plus continuing damages, the same being threefold the damages by it sustained, together with reasonable attorney's fees, interest and costs of this action;

3. That plaintiff be granted such other, further and different relief as the nature of the case may require and as may seem just and appropriate to this Court.

(Count II omitted in printing)

COUNT III

STATE CLAIM FOR MALICIOUS PROSECUTION OR IN THE ALTERNATIVE, ABUSE OF PROCESS

43. Plaintiff incorporates and realleges by reference paragraphs 1-42 as stated above.

44. That on or about August 5, 1981, the defendants, with full knowledge, maliciously and intending to injure the plaintiff in its good name, reputation and credit, to bring it into public disgrace and to cause it to suffer loss of financial credit in its business affairs falsely, maliciously, without probable cause, and wrongfully filed a complaint in the Circuit Court of Clinton County, by and in which they falsely, maliciously and wrongfully, and without any probable or reasonable cause, challenged the issuance of EDC financing with regard to the Westmac Clinton County project.

45. That the proceedings filed with the Clinton County Circuit Court resulted in a 46-page opinion, dated December 3, 1981, denying any form of relief whatsoever to the Circuit Court plaintiffs, defendants herein.

46. That the defendants did individually and together and through the use of such proceedings conspire to monopolize trade and commerce in the central Michigan area by excluding elevator operator competition, including specifically by illegally conspiring and attempting to exclude the plaintiff's elevator operation. Further, defendants attempted to invite and then coerce, through the use of said proceedings, the plaintiff into joining defendants' price fixing conspiracy in restraint of trade and interstate commerce.

47. That the defendants, at the time the Circuit Court proceedings were initiated, had an ulterior motive to the

institution of said proceedings and used such process in an attempt to accomplish an unlawful end and to compel the plaintiff to engage in said conspiracy illegally, and towards an end which they did not request and could not accomplish with a Circuit Court proceeding.

48. Further, and in support of their conspiracy, the defendants formed a sham corporation to bring and prosecute the sham litigation at the Circuit Court level in their attempt to coerce the plaintiff into joining the unlawful price fixing conspiracy and to perpetuate the continued restraint and monopolization of commerce within the particular area.

49. The defendants further elected to continue their sham litigation at the appellate level even after the litigation had been defeated in the Circuit Courts. This appeal was taken by the defendants maliciously and with full knowledge that such an appeal was without merit and lacked probable cause and was pursued merely for the purpose of delaying the issuance of the EDC bonds with regard to the plaintiff's project.

50. Such action was taken by the defendants with the intent to cause the plaintiff such economic harm that it would be unable to continue operation of its central Michigan facility and, further, for the purpose of causing plaintiff to either lose or abandon that facility.

51. Plaintiff incorporates and realleges by reference paragraphs 27-30 and 37-42 of the above-stated allegations.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

1. The defendants and the agents and officers of each of them and all persons combining with or acting in concert with them or under their direction be perpetually and during the pendency of this action restrained and enjoined from conspiring and combining to interfere with the free exercise by plaintiff of its business;

2. That plaintiff be awarded judgment against defendants in the amount of $250,000.00, together with those continuing damages sustained by plaintiff.

3. That plaintiff be granted such other, further and different relief as the nature of the case may require and as may seem just and appropriate to this Court.

WARD, SCHENK & BONCHER
Attorneys for Plaintiff

/s/ By: Gary P. Schenk (P19970)

Business Address:
301 College Park Plaza
180 North Division
Grand Rapids, Michigan 49503
Telephone: (616) 454-8277

Dated: January 10, 1983

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WESTMAC, INC., a Michigan corporation, Plaintiff	)	File No. 81-971
v.	)	MOTION FOR
LON SMITH, et al,	)	SUMMARY
Defendants	)	JUDGEMENT

NOW COME the defendants, with the exception of Lon Smith, Velte, and Sunfield, by and through their attorney, Douglas R. Inglis, and move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, that the above-entitled action be dismissed with prejudice for plaintiff's failure to state a cause upon which relief may be granted, as demonstrated in the attached brief, and that defendants be awarded reasonable costs and attorney fees.

/s/ Douglas R. Inglis (P 15336)
Attorney for Defendants
4111 E. Packard Hwy.
Charlotte, Michigan 48813
(517) 543-4499

Dated: January 22, 1982

UNITED STATES OF AMERICA
IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WESTMAC, INC., a Michigan corporation,

Plaintiff, File No. 81-971

vs.

LON SMITH, et al,

Defandants.

---/

AFFIDAVIT OF JOHN R. WILLIAMS
IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
PURSUANT TO FRCP 56

STATE OF MICHIGAN)
)
COUNTY OF KENT)

NOW COMES John R. Williams, having been first duly sworn, and makes this Affidavit in opposition to defendants' Motion for Summary Judgment in the above-entitled cause.

Your affiant says as follows:

1. That he is president of the plaintiff, Westmac, Inc., a Michigan corporation.

2. That your affiant makes this Affidavit with respect to matters within his personal knowledge.

3. That the allegations of plaintiff's complaint in this cause are true and factually correct to your affiant's personal knowledge.

4. That prior to and during January of 1981, your affiant, as president of Westmac, Inc., together with members of the board of directors of the company and its stockholders, following years of studying market possibilities, did elect to build a modern, high-speed grain elevator facility in Eagle Township, Clinton County, Michigan. Your affiant, the company's directors and stockholders, and its officers elected to build the facility for the purpose of purchasing grain from farm growers in the central Michigan area, storing grain and marketing the same in export and domestic markets. It was decided by your affiant, the company's directors and its stockholders, to acquire land in Eagle Township, Clinton County, to let contracts and to begin construction of the facility as soon as feasibly possible with a view to beginning market operations in October of 1981.

5. Your affiant states that the company's decision to establish its new grain elevator in Clinton County, Michigan, was based upon the company's belief that it could finance the facility through Economic Development Corporation financing as established in Clinton County, preliminary inquiries having been made to the Economic Development Corporation of Clinton County for the purpose of verifying that EDC funding was available for such project.

6. That in approximately February, 1981, defendant Lon Smith, in his own behalf and in behalf of the other conspirators named as defendants in this action, did inquire of your affiant as to whether or not plaintiff Westmac, Inc. intended to build a grain elevator operation in Eagle Township. Clinton County, Michigan, and was ad-

vised by your affiant that was the company's intention to build such a facility.

7. That in February, 1981, plaintiff Westmac made its formal application and request to the Economic Development Corporation of Clinton County, paid its application fee and began the process of seeking EDC financing. A resolution of inducement was passed by the Clinton County EDC on February 26, 1981, and on March 2, 1981, your affiant exercised its options on property in Eagle Township, Clinton County, for the purpose of location of its grain elevator. On March 2, 1981, your affiant and members of the company also appeared at an Eagle Township board meeting to discuss with Eagle Township board members the proposed project. At all of these meetings, none of the defendants nor their representatives were present and no objections were raised to the project.

8. Shortly prior to March, 1981, your affiant was invited to a luncheon meeting in Grand Rapids, Michigan, by Bert Post, a representative of defendant Minor Walton Bean Company, on behalf of himself, his company and the other conspirators named as defendants herein. Ostensibly, the purpose of the meeting as specified by Mr. Post was to "discuss" the new Westmac grain elevator facility to be located in Clinton County.

9. That the Westmac, Inc. grain elevator facility in Clinton County is and was, prior to October, 1981, destined to be a competitor of the defendants named in this cause.

10. That on or about March 2, 1981, your affiant met with Bert Post in Grand Rapids, Michigan, pursuant to the invitation of said Bert Post as hereinabove described.

At and during that meeting, your affiant was urged to participate in establishing a "understanding" about prices to be charged to customers, maintaining standard charges to customers and adopting a so-called two-price system which would result in the payment of prices for grain higher to competitive elevators than to farmers selling grain in the free market place. Your affiant refused to participate in the discussion and upon the advice of the corporation's attorney did immediately report the discussion to the office of the United States District Attorney for the Western District of Michigan.

11. That as a consequence of your affiant's refusal to take part in a conspiracy whose purpose is to fix prices and to restrict the free movement of grain in the central Michigan area and to otherwise engage in an unlawful conspiracy to fix prices and restrain trade, the defendants herein undertook a number of activities whose sole purpose and motivation was to attempt to coerce your affiant into joining said conspiracy to restrain trade and to fix prices, including the following:

A. The establishment of a corporation and "association" whose sole purpose was to attempt to delay the Westmac EDC funding in order to prevent Westmac's modern, high-speed elevator from being built.

B. The transparent motive of the formation of the "corporation" and "association" is clearly demonstrated by the fact that the corporation was formed purely to protect the named defendants from any exposure by setting up a corporate "veil".

C. The undertaking of a series of baseless, groundless and repetitive actions including appearances before legislative bodies, the initiation of a lawsuit and subsequent groundless appeals with a purpose and

motivation to frustrate, hinder and delay the Westmac EDC bond issue in the belief that if the bond issue were delayed, Westmac would suffer such losses from its attempt to establish the elevator that its ultimate ability to operate the elevator would be frustrated.

D. That the initiation of sham litigation by the defendants in this case with a purpose and motivation to frustrate Westmac's finding of its new project was done deliberately and with the motivation to attempt to keep Westmac out of the central Michigan market area and frustrate the building of its new grain elevator.

E. That the sham nature of the litigation has continued through the appellate process in the state courts of Michigan in that litigation undertaken by the defendants was soundly defeated in the Circuit Court for the County of Clinton and yet, defendants undertook an appeal despite acknowledging that there was no possibility for success on the appeal, with the sole motive and purpose to "delay sale of the bonds" after construction had been started by Westmac, Inc., all financial commitments had been made and when a delay in sale of the bonds posed a great probability of loss of the entire project for Westmac, Inc.

12. That following the time when defendant Mid-Michigan Farm and Grain Association, Inc. and the other defendants named herein did cause litigation to be initiated in an attempt to frustrate EDC funding for the Westmac project and subsequent to a time when the said defendants caused an appeal to be initiated, your affiant was informed by defendant Frank Bowles, chief executive officer of the defendant Potterville Elevator Company, that if Westmac agreed to put in a "two-price system" that said Frank Bowles "believed the others

would stop their opposition" to EDC financing for the project. Said defendant Bowles was very emphatic that adoption of that pricing system by Westmac would result in an end to litigation. At this same discussion, said defendant Bowles told your affiant that he had dropped out of the Mid-Michigan Farm and Grain Association, Inc. because he could see that the avowed purpose to test the validity of the law was in fact not the true purpose and that the "real purpose was to flatly deny Westmac EDC funding". Again, your affiant refused to participate in a discussion of adopting any pricing system and asked Mr. Bowles to have his personal attorney contact the attorney for Westmac.

13. That of your affiant's personal knowledge, defendants have conspired to and among them have undertaken all of the acts set forth in paragraphs 19(A) through 19(O) of plaintiff's complaint.

14. That your affiant is aware of at least one other elevator operation built in the central Michigan area at approximately the same time as the construction of the Westmac facility in Eagle Township. To the best of your affiant's personal knowledge, information and belief, that elevator project was constructed with utilization of EDC funding. To your affiant's personal knowledge, the said elevator is a competitor of the same defendants who sought to block the Westmac and delay EDC funding for said project but that your affiant was informed by defendant Frank Bowles that the lack of opposition to that competitor elevator was because it utilized a "two-price system".

15. That your affiant has been informed by an official of the bank where Westmac borrowed its interim building funds to the effect that he had been informed by a representative of defendants that the Clinton County project simply could not survive because your affiant and his company were "taking too small of margins" in pricing to customers in an apparent attempt to disparage Westmac's credit.

16. That Westmac, Inc has dealt and done business in the central Michigan area for more than 10 years prior to the filing of its complaint in this action. That the defendants herein have pursued their litigation against Westmac, Inc. in state courts and their activities before various administrative and legislative tribunals in bad faith and as a "sham" designed to prevent establishment of the Westmac project for anti-competitive reasons.

17. That *the individuals and corporations named as defendants* herein who formed the Mid-Michigan Farm and Grain Association, Inc. for the avowed purpose of "testing the law on EDC funding" with respect to the Clinton County Economic Development Corporation approval of the Westmac project and who opposed Eagle Township and Clinton County approvals for tax abatement, zoning variances, and EDC funding, *are not residents of Clinton County, nor are their principal places of business located in Clinton County.* In point of fact, at least two of the named defendants do business in a county where another grain elevator was constructed at approximately the same time as the Westmac elevator and, as your affiant is informed and believes, said elevator was constructed with the assistance of EDC fi-

nancing without opposition from the said defendants herein.

18. That when it became clear to the defendants herein that they could not coerce Westmac into joining their price-fixing scheme, they conspired to delay and ultimately defeat Westmac's ability to build its elevator in Eagle Township, Clinton County, Michigan, and that the motive of said conspiracy was to monopolize the grain trade in the central Michigan area, exclude Westmac's competition from the market in that area, and to maintain their illegal price-fixing scheme.

19. That the sole purpose of the formation of Mid-Michigan Farm and Grain Association, Inc. and its subsequent initiation of litigation and appeals was to further the conspiracy to coerce Westmac into a price-fixing scheme and subsequently, to monopolize the central Michigan market area, exclude Westmac from competition therein and to maintain the illegal price-fixing scheme of the defendants.

20. That the motivation of the defendants-conspirators as described above is totally summed up in the deposition of Bert Post, a representative of the defendants, at pages 76 and 77 hereof, where Mr. Post is advised that as of the time of his deposition on July 14, 1982, Westmac had been unable to issue the bonds but had managed to go into its business operation. The question was then asked of Mr. Post as follows:

"Q: Do you consider yourself having been unfairly competed against in the last year?"

"A: Unfairly?"

"Q: Yes. You said it hurt you."

"A: It has hurt."

"Q: Is that unfair?"

"A: Very definitely. When you're going to cut the pie in six pieces instead of five, it's going to hurt you."

FURTHER, your affiant saith not.

/s/ John R. Williams

Subscribed and sworn to before me this 15th day of December, 1982.

/s/ Kathy Petersen
Notary Public
Kent County,
Michigan
Commission expires:

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

WESTMAC, INC.,

Plaintiff,

v.

No. G81-971 CA

LON SMITH, SMITH BROS. VELTE & COMPANY, SMITH BROS. VELTE & COMPANY, d/b/a SUNFIELD FARMERS ELEVATOR CO., BERT POST, MINOR WALTON BEAN COMPANY, FRANK E. BOWLES, POTTERVILLE ELEVATOR COMPANY, MID-MICHIGAN FARM AND GRAIN ASSOCIATION, INC. and ALL MEMBERS, STOCK-HOLDERS and OFFICERS OF MID-MICHIGAN FARM AND GRAIN ASSOCIATION, INC.,

Defendants.

OPINION AND ORDER ON DEFENDANTS' MOTION FOR JUDGEMENT SUMMARY
(Filed October 1, 1984)

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This matter is before the Court on a motion for summary judgment brought by defendants Mid-Michigan, *et al.*, (with the exception of Lon Smith, Velte and Sunfield). Defendants allege that plaintiff's antitrust complaint must be dismissed for failure to state a cause of action because the activities complained of are protected by the constitutional right to petition the government for redress of grievances.

Plaintiff's complaint points to a variety of activities on the part of the defendants including price fixing,

sham litigation, and disparagement of plaintiff's business. Although defendants' motion purports to address plaintiff's complaint in its entirety, the focus of defendants' argument is on the protected nature of the state court litigation and opposition in public bodies to the financing of the Westmac project. It is these activities that this opinion will focus on as well.

History of the Case

In 1974 the state legislature of Michigan enacted the Economic Development Corporations Act, Mich. Comp. Laws Ann. § 125.1601 *et seq.* The statute permits municipalities to form local Economic Devolopment Corporations (EDC's) for the purpose of issuing revenue bonds, the proceeds of which are used for the construction of privately owned and operated business. In February 1981 plaintiff Westmac Corporation approached the Clinton County Economic Development Corporation for the purpose of obtaining EDC bonding to assist in the construction of a high speed grain elevator and railroad loading facility in Clinton County. Initial approval of the project by the Clinton County EDC was obtained on February 26, 1981. (See Defendants' Exh. A).

On April 3, 1981, defendant Lawrence C. Smith communicated by letter with other grain elevator operators in the area urging them to communicate their concerns about the method of financing the new grain terminal to the Clinton County officials and to attend and voice their concerns at public hearings. (See Defendants' Exh. C). On May 20, 1981 the Mid-Michigan Farm and Grain Association was established for the stated purpose of promoting

the economic welfare and stability of the agricultural industries of Central Michigan. (See Defendants' Exh. D).

Final approval of Westmac's project was given by the Clinton County EDC on July 28, 1981. Westmac proceeded to arrange for issuance of the tax deductible bonds.

On August 5, 1981 Mid-Michigan filed suit against the Clinton County EDC in the Clinton County Circuit Court, challenging the constitutionality of the EDC Act. Westmac intervened in that suit as a party defendant. The Court rendered a decision on December 3, 1981, upholding the constitutionality of the statute. The decision has been appealed to the Michigan Court of Appeals. Plaintiff filed its antitrust complaint in this Court on December 30, 1981.

Discussion

The thrust of defendants' motion is that in voicing their objections to the funding of plaintiff's grain elevator and in bringing suit against the Economic Development Corporation in the Clinton County Circuit Court, they engaged in protected activity for which they cannot be held liable under the Sherman Antitrust Act. Plaintiff argues that activity such as that engaged in by defendants is not protected "when the purpose of that activity is to inflict harm on a potential competitor, restrain trade by excluding a potential creditor from a market area, all in the furtherance of a monopoly and a conspiracy to fix prices and to prevent competition in a market area." (Plaintiff's Brief, p. 10).

The argument must be analyzed under the *Noerr-Pennington* doctrine.

Attempts to influence the passage or enforcement of laws are immune from antitrust scrutiny, regardless of the anti-competitive purpose behind such attempts. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-71 (1965). This is known as the *Noerr-Pennington* doctrine. The right to petition, upon which the doctrine is based, *see Noerr*, 365 U.S. at 138, extends to all departments of government, and therefore governs the approach of citizens to courts and administrative agencies as well. *California Motor Transport Co. v. Trucking, Unlimited*, 404 U.S. 508, 510 (1972). Lobbying efforts come within the scope of activities protected by the *Noerr-Pennington* doctrine. *Alexander v. National Farmers Organzation*, 687 F.2d 1173, 1195 (8th Cir. 1982), *cert denied*, 103 S. Ct. 2108 (1983).

Anti-competitive purpose will not illegalize conduct aimed at influencing governmental actions.

In *Noerr* plaintiff alleged that defendant railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business. 365 U.S. at 138. The Court held that this fact, in and of itself, did not transform conduct otherwise lawful into a violation of the Sherman Act.

> All of the considerations that have led us to the conclusion that the Act does not apply to mere group solicitation of governmental action are equally applicable in spite of the addition of this factor. The right of the people to inform their representatives in government of their desires with respect to the

> passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

Id. at 139. The Court held that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not all affected by any anticompetitive purpose it may have had." *Id.* at 139-40. "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *United Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965). "This exemption is based upon the First Amendment and hence extends to any legitimate use of the political process by private individuals even if their intent is to eliminate competition." *Westborough Mall, Inc. v. City of Cape Girardeau,* 693 F.2d 733, 746 (8th Cir. 1982), *cert. denied sub nom., Drury v. Westborough Mall, Inc.,* 103 S.Ct. 2122 (1983).

The *Noerr-Pennington* doctrine does not, however, cover attempts to influence the government or the courts that are a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *California Motor Transport,* 404 U.S. at 511. The same exception does not require a pattern of repetitive claims. *See Clipper Express v. Rocky Mountain Motor Tariff Bureau,* 690 F.2d 1240, 1256 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 1234 (1983); *Sage International, Ltd. v. Cadillac Gage Co.,* 507 F. Supp. 939 (E.D. Mich. 1981). The sham exception does, however, require that the bringing of the suit be for no

purpose except interference with the competing business. *See Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386, 388 (9th Cir. 1983) ("[T]he application of the antitrust laws need not be waived when the bringing of a suit is *solely* an effort to interfere directly with a competitor.") (emphasis added); *Alexander v. National Farmers Organization*, 687 F.2d at 1195 ("The sham exception generally involves governmental contacts which are not a genuine attempt to influence official decision making, but instead are *merely* an attempt to interfere directly with the business relationships of a competitor.") (emphasis added).

Where there is a genuine attempt to influence official decision making, the litigation is protected from challenge under the Sherman Act, regardless of the anticompetitive purpose or effect. *Associated Container Transportation (Australia) Ltd. v. United States*, 705 F.2d 53, 58 (2d Cir. 1983).

In *Consortium, Inc. v. Knoxville International Energy Exposition*, 563 F. Supp. 56, 60 (E.D. Tenn. 1983), the Court dismissed plaintiff's sham litigation theory of antitrust violation. The Court noted that "The legal precedent supporting defendants' theory and the existence of factual issues of confusion rebut any claim that the threatened litigation was a 'mere sham'. *Id.*

Judge Tahvonen of the Clinton County Circuit Court certainly did not treat the litigation before him as a sham. In the first page of his opinion he noted that the complaint "represents a fundamental and well-articulated challenge to the constitutional validity of the Economic Development Corporations Act of 1974 . . ." He noted

that the questions were of first impression (Opinion, p. 1), and praised the "astute and thorough briefs filed by counsel for all parties . . ." (Opinion, p. 3). He also noted that appellate review of the case "is likely and perhaps indeed desirable . . ." because of the broad considerations of public policy involved. (Opinion, p. 3). Throughout his 46 page opinion it is evident that Judge Tahvonen took Mid-Michigan's challenges to the EDC Act seriously and as anything but a sham.

Neither can the lobbying efforts by the defendants be considered a mere sham. The EDC Act itself provides that public hearings on project plans must be held before a project can be authorized. Mich. Comp. Laws Ann. § 125. 1615. The Act also provides that "A citizen residing in the project or district area whose interest is substantially affected by the project plan may bring an action against the corporation or municipality for an appropriate remedy at law or for equitable relief." Mich. Comp. Laws Ann. § 125.1621. As Judge Tahvonen noted, "No one could review the EDC Act as adopted or amended and not conclude that its provisions are intended to both facilitate economic development and insure that parties affected by that growth have a fair opportunity to be heard on the merits of any particular project plan. The Association's members and their interests, economic and otherwise, are expressly encompassed by the hearing and review provisions of the EDC Act." (Opinion, pp. 24-25).

Clearly what was involved here was a genuine attempt to influence official decision making. This exercise of the first amendment right to petition is protected by the Constitution and is exempted under the *Noerr-Pennington* Doctrine from antitrust liability.

Moreover, Courts generally require some abuse of governmental processes before finding that litigation is a sham. *See, e.g., Associated Container Transport,* 705 F.2d at 59. Such abuse may take the form of baseless, repetitive claims, *California Motor Transport,* 404 U.S. at 513, litigation begun without probable cause and utilizing perjured testimony, *Sage,* 507 F. Supp. at 947-48, the institution of proceedings in a forum that defendants knew lacked jurisdiction, *MCI Communications v. AT&T,* 708 F.2d 1081, 1156 (7th Cir. 1983), *cert. denied,* 104 S.Ct. 234 (1983), or the institution of numerous appeals when the defendants know that they lack standing. *Landmarks Holding Corp. v. Bermant,* 664 F.2d 891, 896 (2d Cir. 1981).

Absent a showing that the actions are baseless, initiated without probable cause, or tainted cause, or tainted by fraud, perjury, bribery or other practices constituting a corruption of the judicial process, resort to the courts is protected activity entitled to immunity from antitrust liability by virtue of the *Noerr-Pennington* doctrine. *Rohm and Haas Co. v. Dawson Chemical Co., Inc.,* 557 F. Supp. 739, 842 (S.D. Tx. 1983).

In *Westborough Mall,* 693 F.2d at 746, summary judgment was denied where plaintiffs had presented facts that supported an inference of unlawful conduct in defendants' lobbying efforts. Unlike the plaintiffs in *Westborough Mall,* however, the plaintiffs in the present case present no facts to support an inference that the defendants abused the judicial process or engaged in unlawful lobbying techniques.

"[S]ummary judgment is rarely an appropriate response to antitrust litigation, since such litigation so fre-

quently turns upon disputed issues of fact." *Taylor Drug Stores v. Associated Dry Goods,* 560 F.2d 211, 213 (6th Cir. 1977). *See also Hospital Building Co. v. Rex Hospital Trustees,* 425 U.S. 738, 746 (1976); *Poller v. Columbia Broadcasting Systems, Inc.,* 368 U.S. 464, 473 (1962). "Nonetheless, the Rules of Civil Procedure apply in antitrust cases and summary judgment is available to avoid needless trials, which may entail a heavy burden of expense and effort for both the litigants and the judicial system." *Comet Mechanical Contractors, Inc. v. E.A. Cowen Construction, Inc.,* 609 F.2d 404, 405 (10th Cir. 1980).

Where, as here, the protected nature of defendants' lobbying and litigation activities is clear, summary judgment is appropriate. *See Taylor Drug Stores,* 560 F.2d at 213.

Accordingly, defendant's motion to dismiss is GRANTED to the extent that plaintiff's complaint alleges an antitrust violation on the basis of defendant's lobbying efforts and state court litigation. The Court notes, however, that the exempt conduct may be considered "to the extent it tends to show the 'purpose or character' of other, nonexempt activity." *Alexander,* 687 F.2d at 1196. In granting summary judgment as to the defendants' activities that are exempt from liability under the *Noerr-Pennington* doctrine the Court makes no comment on the majority of plaintiff's allegations which charge the defendants with, *inter alia,* fixing prices, disparaging the quality of plaintiff's products, refusing services to present and prospective customers of plaintiff, and conspiring to fix prices and lessen competition. The existence of material questions of fact surrounding these allegations precludes summary judgment on these issues. Moreover, the Court believes, contrary to de-

fendants' assertions, that plaintiff has alleged sufficient facts giving rise to a question of fact as to the extent of plaintiff's damages.

Accordingly, defendants' motion, to the extent that it addresses these claims, is DENIED.

For the foregoing reasons defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.

/s/ Wendell A. Miles, Chief Judge

Certified As A True Copy
Gerald H. Liefer, Clerk

By L. Muras
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date OCT 02 1984

Dated: October 1, 1984

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

WESTMAC, INC.,

Plaintiff,

v.

LON SMITH, *et al.*,

Defendants.

No. G81-971 CA

OPINION AND ORDER DENYING PLAINTIFF'S MOTION TO AMEND PARTIAL SUMMARY JUDGMENT

(Filed January 22, 1985)

/

On October 17, 1984 plaintiff Westmac, Inc. filed a motion pursuant to Federal Rule of Appellate Procedure 5(a) for an order amending this Court's partial summary judgment entered on October 2, 1984. Plaintiff moves for the addition of the statement prescribed by 28 U.S.C. § 1292(b) so that plaintiff may petition for permission to appeal.

Ordinarily appeals may not be taken from interlocutory orders. However, 28 U.S.C. § 1292(b) allows the Court of Appeals to accept an interlocutory appeal if the District Court Judge is of the opinion that an order not otherwise appealable "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ."

In order for plaintiff to file a petition for permission to appeal the interlocutory order must contain the statement prescribed by 28 U.S.C. § 1292(b). F.R. App. P1 5(a). The order may be amended to include the prescribed statement at any time.

The partial summary judgment was granted on the basis that the defendants' actions before state courts and

agencies were protected lobbying and litigation activities under the *Noerr-Pennington* doctrine. Plaintiff contends that the Court's determination was erroneous because of the existence of facts in the record which plaintiff contends provide evidence that defendants' efforts were not a legitimate effort to influence governmental action.

As stated above, for section 1292(b) to apply, the district court must first determine that there is a "controlling question of law." In the instant case plaintiff does not appear to quarrel with the Court concerning the applicable law, but with the Court's factual determination that defendants' lobbying and litigation activities were a genuine attempt to influence official decision making. Fact-review questions are not appropriate for section 1292(b) certification. *Clark-Dietz & Associates-Engineers v. Basic Construction Co.*, 702 F.2d 67, 69 (5th Cir. 1983).

Plaintiff contends that the question of whether or not defendants' activities are protected under the *Noerr-Pennington* doctrine is a question of law. If plaintiff is correct that the issue is one of law, the Court must still find that it is a question on which there is substantial ground for difference of opinion. This factor has been found where the issue presents a question of first impression, *see e.g., Gunter v. Hutcheson*, 492 F. Supp. 546, 565 (N.D. Ga. 1980), *affirmed*, 674 F.2d 862 (11th Cir.), *cert. denied*, 103 S.Ct. 60 (1982); *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 223 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), or where the issue is one on which the courts are split. *See, e.g., Stong v. Bucyrus-Erie Co.*, 476 F. Supp. 224, 225 (E.D. Wisc. 1979). Plaintiff has not pointed to any unsettled questions of law; plaintiff merely disagrees with the Court's findings of fact and application of the law.

The general rule is that appellate review is restricted to final judgments "The general purpose of section 1292 (b) is to provide interlocutory appeal in exceptional cases in order to avoid protracted and expensive litigation." *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 406 (8th Cir. 1979). *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978); *Clark-Dietz*, 702 F.2d at 69 (both cases noting that section 1292(b) appeals are intended for exceptional cases).

In virtually every instance where the Court enters a summary judgment the losing party will disagree with the Court's assessment that there are no material issues of fact and that the other party is entitled to judgment as a matter of law. This is not a novel question of law that should be certified for an interlocutory appeal.

This case is already three years old. The Court of Appeals is very unlikely to grant an interlocutory appeal for the reasons stated above. Moreover, as the Court informed counsel at the status conference on October 24, 1984, plaintiff will be allowed to make a separate record on the issue of the *Noerr-Pennington* doctrine during the course of the trial. Under these circumstances the Court will not enter the section 1292(b) statement as it would only serve to further delay the progress of this case and burden the overtaxed court system. Plaintiff's motion to amend is accordingly DENIED.

IT IS SO ORDERED.

/s/ Wendell A. Miles, Chief Judge

Dated: January 2, 1985

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

WESTMAC, INC.,

Plaintiff, No. G-81-971 CA

v. OPINION AND ORDER ON MOTION FOR REHEARING

LON SMITH, *et al*

Defendants. (Filed March 26, 1985)

This case is presently before the Court on plaintiff Westmac, Inc.'s motion for re-hearing and/or relief from partial summary judgment. The basis for plaintiff's motion is plaintiff's recent receipt of documents that were in the defendants' possession and were not made available to the plaintiff prior to the Court's order granting partial summary judgment. Plaintiff points to three notations in the documents which it contends shed a different light on defendants' position with respect to their prior summary judgment motion. In particular, plaintiff refers this Court to the statement in Exhibit A "if this doesn't succeed, start a lawsuit—bonds won't sell;" the statement in Exhibit B, "actual purpose is to block EDC and tax abatement for the elevator being built in Eagle Twp, one mile N. of Grand Ledge;" and the statement in Exhibit C, "what if I were asked to deny that at times Smith Bros. had agreed to pay what Minor Walton paid."

Preliminarily, this Court finds no reason to consider the material quoted from Exhibit C. This material is alleged to lend credence to plaintiff's argument that an underlying monopoly and conspiracy to fix prices existed. As

the Court specifically stated on page 10 of its opinion granting partial summary judgment:

> In granting summary judgment as to the defendants' activities that are exempt from liability under the *Noerr-Pennington* doctrine the Court makes no comment on the majority of plaintiff's allegations which charge the defendant with, *inter alia,* fixing prices, disparaging the quality of plaintiff's products, refusing services to present and prospective customers of plaintiff, and conspiring to fix prices and lessen competition. The existence of material questions of fact surrounding these allegations precludes summary judgment on these issues.

Because the allegations of price fixing were not the subject of the Court's partial summary judgment, they are not relevant to the present motion for relief from summary judgment.

As to the statements in Exhibits A and B, it is the Court's opinion that while these statements may support plaintiff's theory that defendants acted with an anti-competitive animus, they do not alter the protected nature of defendants' litigation and lobbying activities.

In *City of Cleveland v. Cleveland Electric Illuminating Co.,* 734 F.2d 1157, 1162 (6th Cir. 1984), the Sixth Circuit upheld the trial court's ruling that evidence of a prior lawsuit, even if it had been initiated with a primary intent to do harm to a competitor, was not a "sham" action that fits within the exception to the *Noerr-Pennington* doctrine. The Court quoted with approval the following language from *Hydro-Tech Corp. v. Sundstrand Corp.,* 673 F.2d 1171, 1175 (10th Cir. 1982), a Tenth Circuit case which upheld the trial court's dismissal of an anti-trust claim based on a lawsuit

allegedly filed without probable cause and for an anti-competitive purpose:

> The mere fact that Sundstrand may have instituted its prior action against Hydro-Tech with an anti-competitive intent, i.e., with an intent to gain a business advantage over Hydro-Tech, does not, of itself, bring Hydro-Tech's first claim for relief within the "sham exception" to the Noerr-Pennington doctrine.

In *City of Cleveland,* because there was no showing of clear abuse of process or repetitive, harassing filing of meritless claims, the Sixth Circuit found that the trial judge did not err in ruling that the prior lawsuit did not come within the sham exception the *Noerr-Pennington* doctrine. 734 F.2d at 1163.

The evidence presented by plaintiff supports plaintiff's contention that the state court action was initiated with the primary intent of doing harm to plaintiff's business. Nevertheless, as stated above and in this Court's October 1, 1984 opinion on defendants' motion for summary judgment, anti-competitive purpose will not illegalize conduct aimed at influencing governmental actions. The anti-competitive purpose evidenced in the documents plaintiff brings to this Court's attention does not undercut defendants' legitimate opposition to tax-free EDC bonding and their attempt to litigate the constitutionality of the EDC enabling legislation.

Nothing in the new evidence submitted by plaintiff in support of its motion indicates that defendants' actions were baseless, initiated without probable cause, or were tainted by fraud, perjury, bribery or other practices constituting a corruption of the judicial process. The Court's

original determination of October 1, 1984 is not altered by the newly discovered evidence. Accordingly, plaintiff's motion for re-hearing and/or relief from partial summary judgment is hereby DENIED.

IT IS SO ORDERED.

/s/ Wendell A. Miles
Chief Judge

Dated: March 26, 1985

EXHIBIT A

Doug Inglis 5/14 G-Ledge No Abate EDC

EDL—Stimulate development

Requirement—serve "Public Purpose"

—it needs to be our Focus
explain entitlement to special privilege

Warner Norcross & Judd X GR is John's Legal counsel

Jeoprodize municipality
ability to borrow

1) Send out Doug's prepared letter

2) attend next twp TAX ABATEMENT EAGLE WE NEED LOCAL SUPPORT

3) Write Papers

4) News Conference

5) Maybe some diplomatic advertising

Stress we don't object to private capital

If This Doesn't Succeed

1) Start a lawsuit—bonds won't sell
Unconstitutional—No equal protection of law
Because of 250,000 idea

(Italics added)

EXHIBIT B

Smith Bros., Velte & Co.
—05 4th AVENUE
LAKE ODESSA, MICHIGAN 48849
Phone: (616) 374-8871

TO:

Bob Robinson
221½ South Bridge
Box 97
Grand Ledge, MI 48837

SUBJECT: DATE: 6/24/81

Dear Bob

Attached is 1) Articles of Association 2) ByLaws of an association of basically grain dealers I belong to. *Actual purpose is to block EDC and Tax Abatement for the elevator being built in Eagle TWP, 1-mile N of Grand Ledge.* Our firm is a member. I am the president of the association. The attorney who wrote this up claims there is no potential for liability (personally or corporately).

1) as written—do you agree

2) any personal guidance of things I ought not do to protect self and company for liability?

thanks

Lon

EXHIBIT C

miscellaneous questions and thoughts

the affidavit I signed on Jan 21

On the response that Doug files for other 5 defendants he has attached an excellent article—his contentions regarding the elevator business in general are correct—his legal contentions??? It's excellent background about the conduct of the industry (the Origin of Dispute Section

Doug makes a number of references to exhibits, I know he'd forward copies if helpful

A letter I wrote to area elevators in august 1981 pleaing for more contributions has 2 inflammatory references to "(if nothing else, we'll delay sale of bonds)"

Throughout the thing reference is made to area operators (Including on occasion Westmac) getting together to discuss the business. To set the record straight this was all unofficial, there is no formal structure or association to these meetings, they're held about 2-3 times a year.

What if I were asked to deny that xx at times x Smith Bros had agreed to pay what Minor Walton paid

Do we have grounds for counter claim, if possibly yes, must we do something to maintain our right to persue counter claim.

Can we ask for legal fees

Does Schenk's request for jury trial mean this will automatically be tried in front of a jury. Schenk, by my evaluation, is a good speaker in front of a group, quite persuasive. If we were to go to jury trial I think we'd want a good litigant in our defense.

Is the suit for 3x250 + 250, or just 3x250??

Reference is made to "unnamed defendants" p ..... if we were to lose this would they by called on to make settlement, and is settlement for the suit amount per

party, or to be divided amongst the parties?—Doug makes reference to Westmac Illegally Buying Land prior to approval?—specifically about the suit and it's questions

I presume it makes no difference I am stockholder only thru ESOP

16. "secured necessary financing"—there might be something in either Eagle twp minutes of Clinton Board of Commissioners that the project would not go without EDC—contrary to 16.

17. Interstate—isn't this across state lines—I see how our conduct—if guilty—could have any impact interstate

18. All along we were careful to see that we were legal in our approach, hope we were right! It is doubtful that our ego's are so big we thought we could monopolize interstate trade of grain from Central Michigan.

19d. Doug has pages where he refutes this

e. flatly untrue, we haven't done it, and the association has not done it—but planned to do it.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

WESTMAC, INC.,
Plaintiff,

v.

LON SMITH, *et al.*,
Defendants.

No. G81-971 CA7
OPINION
(Filed
May 21, 1985)

On October 1, 1984 this Court issued an opinion and order granting partial summary judgment in this antitrust action. The Court held that defendants' lobbying and litigation activities were not a "sham" as alleged by plaintiff, and were therefore constitutionally protected under the *Noerr-Pennington* Doctrine from antitrust liability.

Specifically exempted from the partial summary judgment were plaintiff's allegations of price fixing, disparaging the quality of plaintiff's products, refusing services to present and prospective customers of plaintiff, and conspiring to fix prices and lessen competition. (Opinion of October 1, 1984, p. 10). No ruling was made as to plaintiff's state law claims.

Presently before the Court are defendants Frank E. Bowles and Potterville Elevator Company's motion for partial summary judgment and/or dismissal and defendant Bert Post and Mid-Michigan's motion for an order in limine or in the alternative for summary judgment. Defendants claim that the October 1, 1984 partial summary judgment is dispositive of plaintiff's abuse of process and/or malicious prosecution claims; that the Court's ruling as to the federal antitrust violations precludes recovery on the corresponding state antitrust claims; and

that the Court should not exercise pendent jurisdiction over plaintiff's state claims because of the lack of a substantial federal claim.

Plaintiff contends that this Court has implicitly ruled on plaintiff's state law claims because it failed to address them in the order granting partial summary judgment. Plaintiff appears to believe that because the Court did not grant summary judgment as to these claims at that time, that they are no longer open to a pretrial ruling.

The Court invites plaintiff's attention to page 1 of the October 1, 1984 opinion and order on defendants' motion for summary judgment wherein the Court stated:

> Although defendants' motion purports to address plaintiff's complaint in its entirety, the focus of defendants' argument is on the protected nature of the state court litigation and opposition in public bodies to the financing of the Westmac project. It is these activities that this opinion will focus on as well.

The Court treated defendants' motion for summary judgment as a motion for partial summary judgment. It is not improper for defendants now to develop their arguments on plaintiff's remaining claims for the Court's consideration.

Subsequent to the filing of defendants' most recent motions for summary judgment the parties filed a stipulation concerning the damages claimed by plaintiff. The stipulation provides:

> The only economic damages claimed by the plaintiff in this action are additional interest expense and additional attorney's fees incurred by the plaintiff for the time period from the 5th of August, 1981 until the 3rd of December, 1982; those dates being the date of

> the inception of litigation by the defendant Mid-Michigan Farm and Grain and the issuance of the EDC bonds for the Westmac Project, respectively.
>
> Those damages claimed by the plaintiff arise out of those lobbying and litigation activities allegedly taken by defendants which the court has already held to have been protected activities under the Noerr-Pennington Doctrine.
>
> The remaining Antitrust and State Law based claims are not claimed by plaintiff to have given rise to any additional or different economic damages.

The Court addresses the viability of plaintiff's remaining claims in light of this stipulation.

Plaintiff's remaining federal antitrust claims include allegations of price fixing, disparaging the quality of plaintiff's products, refusing services to present and prospective customers of plaintiff, and conspiring to fix prices and lessen competition. Plaintiff, however, has stipulated that the only damages it claims are those arising out of the lobbying and litigation activities of the defendants. Plaintiff attributes no damages to the remaining activities complained of other than those arising out of the lobbying and litigation activities.

The Court has already held that the lobbying and litigation activities and the damages flowing from them are protected. In the absence of any other damages claimed by plaintiff, the Court must find that these remaining antitrust claims will not give rise to damages.

Because the Court has ruled that the lobbying and litigation activities are protected and because all of the economic damages claimed by plaintiff flow from those protected activities, plaintiff has failed to state a cause

of action for economic damages. The only matter remaining for the Court's consideration is plaintiff's request for equitable relief.

In count one of the complaint plaintiff has inserted the following prayer for relief:

> WHEREFORE, plaintiff prays that:
>
> 1. The defendants and the agents and officers of each of them and all persons combining with or acting in concert with them or under their direction be perpetually and during the pendency of this action restrained and enjoined from conspiring and combining to interfere with the free exercise by plaintiff of its business. . .

In his March 21, 1985 deposition, John R. Williams, President of Westmac, gave the following testimony:

> Q. Is the central Michigan grain trading area presently served by both Westmac and the Defendants currently characterized by price fixing?
>
> A. Today?
>
> Q. Yeah.
>
> A. Well, I would—
>
> Q. To your knowledge, best of your knowledge.
>
> A. To my knowledge, I would say no.
>
> Q. Is is currently characterized by monopoly?
>
> A. No.
>
> Q. To your knowledge, is it characterized by a restraint of trade?
>
> A. Not today that I know of.
>
> Q. Or any other anti-trust violations that you are aware of?

A. Not today that I know of, I haven't seen anything.

Q. Excluding matters relating to the litigation, are the Defendants, the Defendants in this case, individual or corporate, doing anything that is causing you damage?

A. Today?

Q. Yes.

A. No.

(March 21, 1985 dep. of John Williams, pp. 47-48).

It is apparent from this testimony that plaintiff no longer has a basis for requesting that defendants be enjoined from conspiring and combining to interfere with plaintiff's business. Accordingly, because plaintiff is not entitled to legal or equitable relief, plaintiff's federal claim must be dismissed.

Plaintiff's remaining allegations concern matters of state law. Because there is no remaining federal question, there is no basis for continued exercise of pendent jurisdiction over plaintiff's state law claims. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). Accordingly, as to plaintiff's state law claims, plaintiff is left to its remedies in state court.

For the foregong reasons defendants' motions for summary judgment on plaintiff's remaining claims are GRANTED and the case is hereby DISMISSED.

IT IS SO ORDERED.

/s/ Wendell A. Miles, Chief Judge

Dated: May 21, 1985

Certified As A True Copy
Gerald H. Leifer, Clerk

By L. Mieras
Deputy Clerk
U.S. District Court
Western Dist. of Michigan

Date: May 22, 1985

JUDGMENT IN A CIVIL CASE

(Filed May 22, 1985)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT

Docket Number G81-971 CA7

Hon. Wendell A. Miles, Chief Judge

CASE TITLE

WESTMAC, INC.

v.

LON SMITH, *et al.*

[ ] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

In accordance with the opinion rendered in this matter on May 21, 1985,

Defendants' motions for summary judgment on plaintiff's remaining claims are GRANTED and the case is hereby DISMISSED.

Gerald H. Leifer, Clerk

/s/ L. Meiras, Deputy Clerk

Date: 5/22/85